Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

HORACE SOLOMON, et al.,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 12 U.S.C. § 1821(e), which permits repudiation by the RTC only of a "contract or lease . . . to which such institution [savings and loan] is a party," preempts obligations imposed on the savings and loan prior to the enactment of § 1821(e) by state laws external to the savings and loan's agreement and bargain?

PARTIES

The petitioners herein are Horace Solomon, individually and as executor of the estate of Lillian Solomon, Peggy Lehman, Ira Kaufman, and Denise Tucker-Kellen. A separate petition is being filed on behalf of Dennis C. Vacco, Attorney General of the State of New York, Joseph Holland, Commissioner of the New York State Division of Housing and Community Renewal, the New York State Division of Housing and Community Renewal, Susan Solomon Pattullo, Lloyd Ribner, as executor of the estate of Muriel Ribner, and Selma Diamond. Jerome Lederer was an appellee below at the time of the original panel decision, but is now deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals is reported at 18 F.3d 111 and is included in the Appendix at pp. 29a-65a. In *Solomon v. RTC*, 115 S. Ct. 43 (1994), and *Pattullo v. RTC*, 115 S. Ct. 44 (1994), this Court vacated the original decision and remanded the case for reconsideration in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). On remand, the court of appeals reinstated its original decision. The remand opinion of the court of appeals is to be reported in F.3d and is included in the Appendix at pp. 1a-27a. The

opinion of the district court that was reversed by the court of appeals is reported at 801 F. Supp. 1152 and is included in the Appendix at pp. 66a-93a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 20, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. § 1821(e)(1)(A) provides:

Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease –

(A) to which such institution is a party[.]

12 U.S.C. § 1821(e)(5)(A) provides:

Leases under which the institution is the lessor. (A) In general. If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either –

(i) treat the lease as terminated by such repudiation;

or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

STATEMENT OF THE CASE

This case returns to this Court following a prior order issued this Term remanding the case for reconsideration in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994). *See Solomon v. RTC*, 115 S. Ct. 43 (1994) (No. 93-1748);

Pattullo v. RTC, 115 S. Ct. 44 (1994) (No. 93-1757). The holding on remand presents questions of profound practical importance to all residents of rent-controlled housing who, like petitioners, face eviction solely to promote the RTC's desire for more money. The petition also raises issues of recurring doctrinal significance because the court of appeals held that when Congress uses the terms "contract" or "lease," even in a context expressly tied to the parties' agreement and bargain, Congress intends to reach and preempt state laws external to that agreement that impose obligations contrary to the parties' bargain. Specifically, in the decision below, the court of appeals held that 12 U.S.C. § 1821(e), enacted in 1989 by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), which allows the RTC to repudiate a "contract or lease . . . to which such institution [savings and loan] is a party" preempts state statutory tenancy laws. The court reached this decision in conflict with the holding of *O'Melveny*, as well as with other decisions of this Court, other circuit courts, and the New York courts that have repeatedly held that obligations imposed by state law cannot be equated with or considered part of the contract, agreement, or bargain of private parties.

The decision below imperils the homes of the approximately ten percent of Americans who live in rent-controlled housing. Thousands of such units are now owned by the RTC and FDIC as receivers for failed savings and loans and banks. But the practical importance of the decision is hardly limited to rent-controlled tenants. The court below acknowledged that the rationale of its decision applies to a wide variety of obligations that arise by operation of law, including implied warranties and obligations to provide essential services imposed by state and local housing codes throughout the country. This Court's review is warranted to decide the important issues and resolve the decisional conflicts presented by this case.

A. Factual Background

1. *Petitioners*: The individual petitioners are each tenants in rent-controlled or rent-stabilized apartments in 444

East 57th Street, a 45-unit apartment building (the "Building"). For the convenience of the Court, petitioners will focus on Peggy Lehman, whose legal interests are typical of the other petitioners.

Mrs. Lehman has resided in apartment 12E of the Building since 1969. Mrs. Lehman is more than 70 years old. R. 354.[1]

During 1983 and 1984, the owner of the Building converted the apartments to cooperative ownership. Pursuant to New York's Martin Act, see N.Y. Gen. Bus. Law §§ 352e and 352eeee, Mrs. Lehman had two options. First, she could purchase her apartment as a current tenant at a price that, under New York law, must be lower than the price offered to non-tenant purchasers. In the case of Mrs. Lehman, the reduced tenant price was approximately 59% less than the price offered to non-tenants. R. 364. Mrs. Lehman's second option, also provided to her by New York statutes and regulations, was to stay in her apartment for as long as she paid the rent set by regulation. Pursuant to the requirements of New York law, the owner of the Building supplied Mrs. Lehman with written offering disclosures that advised her of her two options under New York law.

In view of Mrs. Lehman's age, it is not surprising that she chose to continue to rent her apartment rather than purchase it. Because of the requirements of New York law, her quite reasonable expectation was that she would remain as a tenant and not be evicted from her family home for the remainder of her years so long as she paid her rent-stabilized rent. Indeed, Mrs. Lehman testified via affidavit that her decision not to purchase her apartment was made "[i]n reliance on the terms of the offer that I could elect not to purchase and continue to remain in possession of my apartment under the Rent Stabilization Law." R. 357-58.

Following her decision, however, a series of events completely beyond Mrs. Lehman's control led to this litigation. In

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[1] References to R. are references to the Joint Appendix filed in the Second Circuit.

1984, the owner of the Building pledged Mrs. Lehman's apartment, along with nine others whose tenants had chosen not to purchase, as collateral for a $3.2 million loan from Nassau Federal Savings and Loan Association ("Nassau S&L"). Neither Mrs. Lehman nor any other petitioner knew of or had any involvement with the Nassau S&L or this loan. R. 360-61.

When real estate values in New York and other parts of the country fell sharply, the owner of the Building defaulted in July 1987 on the remaining loan balance of $3,035,711, which was later paid down to less than $2,900,000. R. 217. Nassau S&L purchased the apartments at a foreclosure sale in March 1989, using the loan deficiency as its bid. Under New York law, Nassau S&L succeeded to the owner's rent-control and rent-stabilization obligations.

RTC was appointed receiver for Nassau S&L in 1990. RTC initially informed Mrs. Lehman that she should continue to make the rental payments owed under the terms of her statutory tenancy to the RTC. R. 390. Although Mrs. Lehman did so, RTC later reversed course. RTC had learned that the apartments that Nassau S&L owned in the Building had been appraised at $2,837,400, if the existing statutory tenancies applied. *Id.* at 233. Sale at that price would have resulted in the recording of a small loss on the receiver's books. Without the statutory tenancies, the apartments had been appraised at $7,565,000, and thus, if RTC could evict Mrs. Lehman and the other statutory tenants, it could obtain a substantial profit. *Id.* RTC also knew that it owned, or would likely come to own, approximately 2200 rent-controlled or rent-stabilized apartments in the New York and New Jersey region, as well as other similar housing units in other regions, including 1000 units in the Atlanta region alone. *Id.* at 270, 272, 276.

RTC's Board of Directors determined to bring this case as a "precedent setting" vehicle to establish that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. RTC's Board of Directors in Washington, D.C. chose this case as its "precedent setting" vehicle, notwithstanding that it was informed by RTC officials that "several of the tenants are in their 80's, and at least

one is known to be in failing health." *Id.* Indeed, two of the test defendants selected by the RTC, Lillian Solomon and Jerome Lederer, have died during the course of this litigation.

Following the decision of RTC's Board, the RTC sent written notice to Mrs. Lehman of its "disaffirmance and repudiation of your lease of the Apartment." R. 394. Initially, RTC advised Mrs. Lehman that she had to vacate her home within 44 days. *Id.* at 392.

2. *New York's Rent Control and Rent Stabilization Laws:* New York has had some form of rent regulation continuously since 1942, when rent control was imposed by federal statute during World War II. See Emergency Price Control Act of 1942, 56 Stat. 23. In 1946, New York state law imposed rent regulation in the form of rent control. Recently the New York Legislature confirmed the continued existence of a serious housing shortage and extended rent regulation until June 15, 1997. N.Y. Rent Regulation Reform Act of 1993 (L. 1993, c. 253).

Under the rent control statute and regulations, the rental amount is set and reset biennially pursuant to regulatory guidelines and the tenant has a statutory entitlement to remain in the apartment so long as the statutory rent is paid. N.Y. Unconsol. L. § 8585.1 (McKinney 1987); accord N.Y. City Rent Control Law, N.Y.C. Admin. Code § 26-408.a, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987); N.Y. City Rent and Eviction Regulations § 2204.1, codified after N.Y. Unconsol. L. § 8597 (McKinney 1987). These statutory and regulatory provisions expressly state that the obligations apply to any person who owns the property and to any "tenant . . . notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." *E.g.*, N.Y. City Rent Control Law § 26-408.a; see also, *e.g.*, N.Y. Unconsol. L. § 8585.1. Under rent control, it is illegal, "regardless of any contract, lease or other obligation . . . for any person to demand or

receive any rent . . . in excess of the maximum rent." *Id.* (emphasis added).

New York's rent stabilization laws were initially adopted in 1969. The nature of the obligations they impose is identical in substance to that of rent control. The rent is set biennially by regulatory guidelines and a tenant may not be evicted "[a]s long as the tenant continues to pay" the regulatorily-set rent. N.Y. City Rent Stabilization Code, N.Y. Comp. Codes R. & Regs. § 2524.1(a), codified after N.Y. Unconsol. L. § 8634 (McKinney 1987). Although the rent stabilization laws use the administrative device of a renewal lease as a trigger for the owner's right to charge the increased rent set by regulatory guidelines, the owner is obligated by law, not by contract, to provide the renewal lease. See N.Y. City Rent Stabilization Law § 26-511.c(9) ("an owner shall not refuse to renew a lease"). If the owner refuses to comply with its statutory obligation to provide a renewal lease, New York by statute establishes the tenant's right to remain in the apartment at the old rental rate and protected from eviction. See N.Y. City Rent Stabilization Code § 2522.5(b)(2).

B. The Proceedings Below

In February 1991, the RTC brought this action seeking a declaration that it could evict Mrs. Lehman and the other petitioners in contravention of New York's statutory tenancy laws. The district court determined that under both the plain meaning of New York's statutory and regulatory provisions, as well as a number of express decisions of New York courts, the obligations imposed by New York's statutory tenancy laws were a matter of legislative compulsion, not a matter of any obligations created by, pursuant to, or embodied in a contract or lease, and that "even if there is a contractual element to the landlord-tenant relationship under the rent regulations . . . [,] the tenants' right of occupancy is still independent of that contractual or lease relationship." App. 75a-80a. The court further held that Section 1821(e) could not properly be "interpreted broadly to include nonlease statutory rights of occupancy" that were not created as an obligation by a contract or

lease. *Id.* at 84a. The court concluded that "[t]he RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than the powers granted by statute." *Id.* at 90a-91a. Accordingly, the district court granted summary judgment for petitioners.

The court of appeals reversed. First, the court held that it was error for the district court to hold that application of Section 1821(e)(1) is controlled by whether petitioner's rights as a statutory tenant were a matter of contract or lease under state law. Instead, the court of appeals held that "the definition of the phrase 'contract or lease' is a matter of federal law." *Id.* at 43a. Under its concededly expansive approach, the court held that the statutory rights created by New York's rent control and rent stabilization laws fell within the term "contract or lease" in Section 1821(e) because such rights were "lease-based" or "contract-based." *Id.* at 46a, 52a. The court thus viewed rent control and rent stabilization as "affect[ing] the lease by statutorily altering and specifying certain terms." *Id.* at 50a. The court acknowledged that its rationale allows RTC and FDIC to repudiate a broad range of state law requirements applicable to landlords, including statutory requirements that landlords provide certain "services" (*id.* at 47a), as well as obligations that arise "by operation of law," including the implied "warranty of habitability" that "virtually all states read . . . into residential lease-contracts" (*id.* at 45a).[2]

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[2] The court also rejected an alternative ground for affirmance. Under 12 U.S.C. § 1821(e)(5), a lessee of real property must be allowed to "remain in possession of the leasehold interest for the balance of the term of the lease." Petitioners argued that if a statutory tenancy were construed to be a "lease" under Section 1821(e)(1), then a statutory tenant must be allowed to remain in possession under Section 1821(e)(5) for the "balance of the term of the [statutory tenancy]." The court held that as a matter of federal law it could not use the term of the "statutory occupancy rights to delimit the leasehold for FIRREA purposes." App. 56a. The court explained that "the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be considered fairly to accommodate so prolonged a residual tenancy." *Id.* at 58a.

This Court, over the opposition of the RTC, vacated the original decision of the court of appeals and remanded the case for "further consideration in light of *O'Melveny & Myers v. Federal Deposit Insurance Corporation*." 115 S. Ct. at 43-44. As petitioners had informed this Court that they would do, on remand in early November 1994, petitioners moved for certification of any disputed state law issues to the New York Court of Appeals. Petitioners also requested oral argument on both the impact of *O'Melveny* and the motion to certify. The court of appeals never ruled on the request for oral argument. Instead, the court of appeals requested simultaneous letter briefs from both sides and, without oral argument, issued a new opinion that "reinstate[d]" its original opinion and did not address certification. App. 4a.

In its reinstatement opinion, the court of appeals held that "nothing in *O'Melveny* . . . militates against" creating a federal law definition of the phrase "contract or lease," rather than adopting state law. *Id.* at 12a. The court then created a federal definition of "contract": if a relationship between private parties begins with a contract, then the "contract" includes "obligations imposed on their relationship by state (or federal) law." *Id.* at 18a. Thus, the court held that, under its federal law definition, New York's statutory tenancy obligations were part of the "contract or lease" because the "tenancy itself – the interest in the property – was created by the lease." *Id.* at 19a. The court of appeals supported its broad approach with its analysis that "the entire purpose underlying RTC's repudiation power is the maximization of return of assets." *Id.* at 21a.[3] Eleven days *after* the reinstatement opinion, the court of appeals denied the motion to certify any state

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[3] The court again interpreted federal law to reject using New York's "statutory occupancy rights" as the "term of the lease" under § 1821(e)(5). *See* App. 24a ("we could not permit the state to nullify the RTC's federal power by imposing a residual lease term" of that duration). Having rejected that aspect of state law, the court chose other areas of New York law as being, under federal law, more permissible (*i.e.*, shorter) "analog[s]" for the residual lease term. *Id.* at 25a-27a.

law issues "as moot in light of the opinion issued on remand." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

I.

This is a case of both great practical and legal importance. As is more fully developed *infra*, at pp. 13-29, four principal factors demonstrate the importance of this case:

- This Court's prior order to grant, vacate, and remand (or "GVR") demonstrates that this case is important. Through GVRs, the Court gives some indication of its own assessment of the breadth and meaning of its prior opinion. As this Court has explained, a GVR means this Court has "found [the intervening decision] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam). Given this Court's core function of assuring the internal consistency of the body of federal decisional law, it follows that when, on remand from a GVR, a circuit court or highest state court distinguishes this Court's opinion, this Court is and should be more likely to grant certiorari and review the decision. See, *e.g.*, *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817, 822 (1995); *ICC v. Transcon Lines*, 115 S. Ct. 689, 693 (1995); *Dalton v. Specter*, 114 S. Ct. 1719, 1724 (1994). As demonstrated, *infra*, at pp. 21-29, the decision below is in irreconcilable conflict both with *O'Melveny* and with the decisions of other courts of appeals interpreting FIRREA.

- This case presents the recurring and fundamentally important preemption issue of whether obligations imposed by a state on parties to a relationship created by a contract should be considered part of that contract. The decision below is in strong conflict with three decisions of this Court indicating that obligations imposed by state law ordinarily are not part of the contract. See *American Airlines*, 115 S. Ct. at 824, 826 & n.5; *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 & n.24 (1992); *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1111 (1992). The decision below is also in conflict with the decisions of seven other circuit courts that have

addressed this issue in the context of FIRREA, the Bankruptcy Code, and other statutes. *See, infra,* at pp. 13-21.

• As this Court recently stated, "rent control statutes regulat[e] housing throughout the country." *Yee v. City of Escondido,* 112 S. Ct. 1522, 1528 (1992).[4] Approximately ten percent of all rental housing (2.8 million units) in the United States is covered by rent control. See U.S. Dep't of Hous. and Urban Dev., Office of Policy Dev. and Research, *Report to Congress on Rent Control* 1 (Sept. 1991). In addition, numerous States control the rents for mobile homes. See, *e.g., Yee, supra.* Moreover, a number of States regulate the rent charged by railroads to tenants on properties adjacent to the railroads' rights-of-way. See, *e.g., In re Chicago, Rock Island & Pac. R.R.,* 772 F.2d 299 (7th Cir. 1985), *cert. denied,* 475 U.S. 1047 (1986).

The failure of hundreds of savings and loans and banks has brought literally thousands of rent-controlled properties under the ownership of RTC and FDIC receivers. RTC's Board of Directors chose to bring this case as a "precedent setting" vehicle to establish nationwide that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. Press reports indicate that the RTC is prepared to use the decision below in support of its efforts to preempt rent control laws and evict tenants in California, Connecticut, and elsewhere. See "2nd Circuit Adds to Agency Power," *The Thrift Regulator,* Mar. 14, 1994, at 3.

The record in this case reveals that RTC owns at least 2200 rent-controlled housing units in the New York-New Jersey region, and another 1000 such units in the Atlanta region alone. See *supra,* at p. 5. The FDIC as receiver of other

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[4] *Yee* upheld California's rent control statute applicable to mobile homes against a takings challenge. *See* 112 S. Ct. at 1528-29. Applying *Yee,* the New York courts have upheld the rent control statutes at issue in this case. *See Rent Stabilization Ass'n v. Higgins,* 630 N.E.2d 626, 632-33 (N.Y. 1993), *cert. denied,* 114 S. Ct. 2693 (1994); *Dawson v. Higgins,* 610 N.Y.S.2d 200, 206 (N.Y. App. Div.), *appeal dismissed,* 83 N.Y.2d 996 (1994), *cert. denied,* 115 S. Ct. 724 (1995).

failed savings and loans and banks obviously also owns a substantial additional number of such housing units, and the FDIC has indicated that it both views the decision below as "significant" and intends to use that decision in rent control and a variety of other preemption cases. "*Diamond* Upholds FDIC Stand On Pre-emption," *Banking Attorney*, Feb. 6, 1995, at 2. Because the decision below is intended by the government to set a "precedent" (R. 269) affecting thousands of rent-controlled tenants in various parts of the country and other preemption cases, that decision warrants review by this Court.

• Finally, the effect of the decision below is not limited to rent control laws. The decision has a breathtaking scope. The court of appeals acknowledged that its rationale would preempt the essential "services" obligations imposed by state and local housing codes in every state. App. 47a. Indeed, the court similarly acknowledged that its rationale would preempt the implied warranties that "virtually all states . . . read into residential lease-contracts." *Id.* at 45a.[5]

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[5] The importance of this case is reflected in the wide reporting that this Court's previous order and the two opinions of the court of appeals have received in the legal, thrift and banking, real estate, and general press. *See, e.g.*, "2nd Circuit Limits *O'Melveny* Scope," *Banking Attorney*, Feb. 6, 1995, at 1; "Second Circuit Reinstates Repudiation Decision," *Bank Bail-out Litigation News*, Feb. 8, 1995, at 1; *U.S. Law Week*, 63 U.S.L.W. 2463 (Feb. 7, 1995); "High Court Blocks Rent Control Evictions," *N.Y. Times*, Oct. 4, 1994, at B2; "Broad View of *O'Melveny*: High Court Sees State Law As Controlling In Failures," *The Banking Attorney*, Oct. 10, 1994, at 1; "Supreme Court Reins In FDIC Outlook On Enforcements," *The Thrift Regulator*, Oct. 10, 1994, at 4; *U.S. Law Week*, 62 U.S.L.W. 2566 (Mar. 22, 1994); "2nd Circuit Adds to Agency Power," *The Thrift Regulator*, Mar. 14, 1994, at 3; "Court Rules RTC Can Evict Tenants," *Real Estate Weekly*, Mar. 9, 1994, at 1; "Resolution Trust Wins Rent-Control Case In New York," *Wall St. J.*, Mar. 3, 1994, at B9. That importance is also reflected in the four *amici* briefs filed in support of granting certiorari when this case was previously before this Court.

II.

This Court has repeatedly held that rent control is "a legitimate exercise of [a state's] police powers." *Pennell v. City of San Jose*, 485 U.S. 1, 12 & n.6 (1988). Last Term, this Court re-emphasized that a federal statute will not be held to preempt the application of a state's police powers to real property unless "the implication is unambiguous." *BFP v. RTC*, 114 S. Ct. 1757, 1765 (1994). When there is ambiguity, the statute "will be construed to adopt, rather than to displace, pre-existing state law." *Id.* This "unambiguous" intent standard applies to the scope of preemption as well as to whether there is any preemption at all. *E.g., English v. General Elec. Co.*, 496 U.S. 72, 79, 83, 86 (1990). Although the court of appeals has written two opinions in this case, it has never acknowledged, much less applied, this fundamental preemption standard.

The court of appeals' initial error in ignoring the threshold legal standard for preemption led it to adopt a holding that is in direct and irreconcilable conflict with decisions of both this Court and other courts of appeals. First, as demonstrated *infra*, at pp. 14-19, in a series of decisions culminating in the recent opinion in *American Airlines, Inc. v. Wolens*, this Court and circuit courts have held that when considering preemption, and other issues, "contract" obligations do not include obligations imposed by state law on parties to a contract. The decision below obliterates that distinction. Second, as demonstrated *infra*, at pp. 21-29, the decision below conflicts with a number of core holdings of *O'Melveny*, as well as with other circuit court decisions interpreting FIRREA.

A.

The remand order of this Court was issued three months prior to this Court's recent decision in *American Airlines*. We address the conflict between *American Airlines* (and similar decisions) and the decision below first because that conflict concerns a preemption issue of very broad significance – the line between state "law" and "contract" – that recurs across a wide variety of federal statutes and is thus of fundamental

doctrinal importance in applying the Supremacy Clause of the Constitution.

1. In *American Airlines*, the Court addressed a statutory preemption clause that provided that "[no] state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates. . . . " 49 U.S.C. App. § 1305(a)(1). This Court adopted the *federal government's* argument that there was a fundamental "distinction" between (a) obligations imposed by state law on parties to a contract that reflect the state's "own substantive standards" and (b) the parties' "own, self-imposed undertakings." 115 S. Ct. at 824, 826 & n.5. This "distinction between what the State dictates and what the [party] itself undertakes" meant that state statutory obligations imposed on parties in a contractual relationship – *e.g.*, the Illinois Consumer Fraud Act – fell under the term "law," but that "contract" obligations that reflected the "parties' bargain," rather than "state laws or policies external to the agreement," did not. *Id.* at 826.

If the decision below on remand is correct, then *American Airlines* was wrongly decided. Under the rationale of the decision below, the airline-passenger relationship is "created" by a contract and the Illinois Consumer Fraud Act imposes obligations on that relationship. Thus, under the decision below, obligations imposed by the Illinois Consumer Fraud Act should be considered part of the "contract." *American Airlines* squarely holds to the contrary.[6]

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[6] The decision below is also in stark conflict with the government's brief in *American Airlines*, which the Court expressly found "persuasive[ ]." 115 S. Ct. at 824. That brief cogently explained that rules that "seek to effectuate the State's public policies, rather than the intent of the parties" should not be considered part of the contract. Brief of the United States as *Amicus Curiae*, No. 93-1286, at 28 (quoted in *American Airlines*, 115 S. Ct. at 826 n.8). In particular, the government explained, "substantive policy choices . . . derived from state legislation," as well as common law

The opinion of the Court in *American Airlines* expressly followed the reasoning of the plurality opinion in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *American Airlines*, 115 S. Ct. at 824. In *Cipollone*, the preemption provision, 15 U.S.C. § 1334(b), applied to "requirement[s] . . . imposed under state law." The *Cipollone* plurality held that this phrase preempted certain obligations imposed by state tort law, "as well as statutes or regulations," even though the relationship at issue (purchaser-seller) is initiated in contract. 112 S. Ct. at 2620. In contrast, "express warranty" claims were not preempted because the obligation created by the express warranty is "not 'imposed under State law,' but rather imposed *by the warrantor*." *Id.* at 2622 (emphasis in original). Thus, *Cipollone* carefully distinguished a "contractual commitment" – a "requirement . . . 'imposed' by the contracting party upon itself" – from obligations imposed by the state on parties to a contractual relationship as a matter of the state's social policy. *Id.* at 2622 n.24. The decision below improperly eliminates this distinction.

2. The decision is also in conflict with this Court's interpretation of the Contract Clause. In *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), the Court held that a state statute imposing obligations on employers different from those in their contracts with their employees did not become part of the contract; thus, the state statute could later be changed without violating the Contract Clause. *Id.* at 1109-11. This Court explained that to interpret "contract" to include laws that altered or nullified the parties' "bargained-for terms" would "expand the definition of contract so far that the constitutional provision would lose its anchoring purpose, *i.e.*, 'enabl[ing]

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doctrines such as "unconscionability," should not be considered part of the contract. *Id.* at 28-29. Only terms that "are purely voluntary and of the parties' own making" should be considered part of the contract, not "official, government-imposed policies." *Id.* at 16, 21. The occupancy and rent obligations imposed by state rent regulation laws are clearly "official, government-imposed policies."

individuals to order their personal and business affairs according to their particular needs and interests.' " *Id.* at 1111 (citation omitted).[7] Using similar reasoning, the Third Circuit has specifically held that a "statutory tenancy" was "non-consensual" and thus not part of the contract under the Contract Clause. *Troy Ltd. v. Renna*, 727 F.2d 287, 297 (3d Cir. 1984).

3. The decision below is also in conflict with three sets of circuit court decisions holding that terms such as "agreement," "contract," or "lease" do not extend to obligations imposed by state law on parties to a relationship created or initiated by a contract. *First*, the Second Circuit acknowledged in its second opinion that the term "contract or lease" is no broader than the word "agreement." App. 16a. This places the decision below in square conflict with the decisions of four other circuits interpreting a related provision of FIREA, 12 U.S.C. § 1823(e), which provides that a person cannot assert an unwritten or unrecorded "agreement" against the FDIC or RTC. *Cf. Begier v. IRS*, 496 U.S. 53, 57 n.2 (1990) (certiorari granted where courts of appeal were split on "related issues" involving similar statutory provisions, although "[n]o other Court of Appeals has decided a case that presents the precise issue we decide here").

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[7] *See also Thorpe v. Housing Auth.*, 393 U.S. 268, 279 (1969) (regulatory restriction on eviction imposes an obligation "not contained in the contract" but rather imposed by agency's "wholly independent rule-making power"); *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 467 (1985) ("Legislation outlining the terms on which private parties may execute a contract does not on its own constitute a statutory contract, but is instead an articulated policy that, like all policies, is subject to revision or repeal."); *United States v. Vanderbergen*, 969 F.2d 338, 340 (7th Cir. 1992) (Easterbrook, J.) (rejecting statutory interpretation proffered by the government that relied on "the theme that state law is part of every contractual relation. . . . Taken to its limits, this approach crushes all distinction between public and private assent. *General Motors Corp. v. Romein* . . . shows that incorporation of public law into private contract is not taken to its limit.").

These other circuits have repeatedly held that when obligations are imposed by state law on parties to a relationship created by an agreement, those obligations are not part of the "agreement" for purposes of FIRREA. See *MotorCity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 39 F.3d 292, 299-300 (11th Cir. 1994) (tort law duties); *Villafane-Nariz v. FDIC*, 20 F.3d 35, 41-42 (1st Cir. 1994) (where state law required bank to accept assignment, that acceptance was not part of an "agreement" because it did not reflect "bargaining, consideration, [or] an exchange of promises"); *Hanson v. FDIC*, 13 F.3d 1247, 1252 (8th Cir. 1994) ("agreement" only reaches tort duties of alleged tort is "based upon or arose from an agreement"); *Bateman v. FDIC*, 970 F.2d 924, 927-29 (1st Cir. 1992) (Breyer, C.J.) (mechanic's lien); *Garrett v. Commonwealth Mortgage Corp.*, 938 F.2d 591, 594-95 (5th Cir. 1991) (common law and state statutory claims for breach of fiduciary duty and negligence); *Patterson v. FDIC*, 918 F.2d 540, 544-45 (5th Cir. 1990) (statutory homestead interest). The rationale of these decisions is that "agreement" is synonymous with "contract" and that both terms are limited to obligations whose source "resided in the provisions of the- . . . agreement," not in substantive policy choices imposed by state law. *MotorCity*, 39 F.3d at 300. The decision below is exactly to the contrary.

Second, the decision below is also in conflict with two circuit court decisions holding that the words "contract" or "lease" in 11 U.S.C. § 365(a) – the parallel repudiation provision of the Bankruptcy Code[8] – do not apply to obligations imposed by state rent control or other state housing laws even though the tenancy is created by a contract. *In re Chicago, Rock Island & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), held that a bankruptcy trustee must comply with state rent control laws

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[8] On remand, the Second Circuit apparently and correctly abandoned any suggestion that the terms "contract" or "lease" might have contradictory meanings in 11 U.S.C. § 365(a) and 12 U.S.C. § 1821(e).

even *after* a lease is repudiated by the trustee. In *Saravia v. 1736 18th St., N.W., Ltd.*, 844 F.2d 823 (D.C. Cir. 1988), the court held: "[T]he public obligations imposed by [state] law are simply not implicated by the right of rejection. Rejection of the leases did no more than release the debtor from the contractual obligations undertaken in those leases. The debtor does not cease to be a landlord simply by virtue of rejection of the leases, and there is no reason to exempt the [debtor] from obligations imposed by local law on all landlords." *Id.* at 826-27; see also *id.* at 827 (rejection of lease extends only to "privately undertaken contractual obligations"; in contrast, "the obligations imposed by [state statute] . . . are *independent* of private leases") (emphasis added). The power to reject a "contract" or "lease" only covered "lease covenants [that] go beyond the requirements of law (for example, providing for a doorman, indoor parking, and the like)." *Id.* Of course, the Second Circuit held precisely the opposite. See App. 18a-19a, 52a. Cementing the conflict is *Saravia's* citation to a prior lower court decision holding that the term "contract" or "lease" in 11 U.S.C. § 365(a) did not preempt *New York's* rent control laws. *See* 844 F.2d at 826 (citing *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986)). The rights of thousands of tenants are too important to be left to the happenstance of the federal judicial circuit in which they reside.

Third, three circuit courts have relied on *Cipollone* to hold that because obligations that "arise by operation of law," including implied warranties, do not have "a voluntary quality," they should not be considered part of the contract. *Papas v. Upjohn Co.*, 985 F.2d 516, 519-20 (11th Cir.) (interpreting FIFRA), *cert. denied,* 114 S. Ct. 300 (1993); accord *Michael v. Shiley, Inc.*, 1995 U.S. App. LEXIS 2249, at *22, 25-29 & n.6 (3d Cir. Feb. 7, 1995) ("contractual obligations differ fundamentally from state imposed regulatory requirements"); *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 18 (1st Cir. 1994) (interpreting Medical Devices Amendments). Although the Second Circuit cited *Cipollone,* it held precisely the opposite

to the First, Third, and Eleventh Circuits, *i.e.*, that obligations that arise "by operation of law," including implied warranties, are part of the contract. See App. 18a, 21a-22a, 45a. To be fair to the Second Circuit, other lower courts have also interpreted *Cipollone* to support holding that obligations imposed by operation of law, including implied warranties, are part of the contract. See, *e.g.*, *Grinnell v. American Tobacco Co.*, 883 S.W.2d 791, 798 (Tex. Civ. App. 1994); *Ministry of Health v. Shiley, Inc.*, 858 F. Supp. 1426, 1440 (C.D. Cal. 1994). But these decisions do no more than show that the conflict in the interpretation of *Cipollone* is widespread. Thus, they merely reinforce the importance of the issue and make it more worthy of certiorari. See R. Stern, E. Grossman, S. Shapiro, and K. Geller, *Supreme Court Practice* § 4.5, at 170 (7th ed. 1993), and cases cited therein.

4. In placing itself in conflict with the various decisions discussed above, the Second Circuit relied heavily on *Norfolk & Western Railway v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), as support for its broad holding that obligations imposed by state law are part of the contract. App. 18a. But this interpretation of *Norfolk* is directly contradicted by *American Airlines*, which states that the holding in *Norfolk* is confined to the specific statutory language at issue in that case. See *American Airlines*, 63 U.S.L.W. at 4069 n.6.[9] If, however, *Norfolk* standing alone could be read as broadly as

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[9] As *American Airlines* explains, the specific purpose of the statute in *Norfolk* was to remove any impediments to an ICC-approved rail carrier consolidation. To that end, the statute preempted all "law . . . as necessary to let the participant carry out the transaction." 49 U.S.C. § 11341(a). As this Court noted in *American Airlines*, the premise of the narrow holding in *Norfolk* was that the statute would make no sense and consolidations would be virtually impossible if ICC approval did not override collective bargaining agreements. *See* 115 S. Ct. at 824 n.6. There is no similar context here. Most of the contracts and leases that RTC generally seeks to reject under 12 U.S.C. § 1821(e) have no relation to rent control or any other external obligation imposed by state law. *See also Saravia*, discussed *supra*, at p. 18.

the Second Circuit suggests, then the obvious tension between *Norfolk* as so interpreted and the *American Airlines – Cipollone – Romein* line of cases by itself warrants review by this Court. See *Supreme Court Practice, supra,* § 4.5, at 176, and cases cited therein.

5. The government may be tempted to argue that there is no conflict between the decision below, on the one hand, and *American Airlines* and similar decisions in this Court and the circuit courts, on the other, because none of the decisions on which we rely interprets 12 U.S.C. § 1821(e). Such an argument would be an improperly narrow view of what constitutes a decisional conflict in statutory interpretation warranting certiorari. See, *e.g., Begier v. IRS,* 496 U.S. at 57 n.2. More fundamentally, such an argument would ignore that it is vital to "our constitutional scheme" to have a clear and principled preemption doctrine that is applied consistently to the body of federal statutes. *Gregory v. Ashcroft,* 501 U.S. 452, 460-61 (1991). As we have demonstrated, the proper standard for drawing the line between "law" and "contract" is a recurring and important issue in preemption doctrine. It cannot be that there is no general standard and therefore courts get to choose on a case-by-case-basis in preemption cases whether obligations imposed by law on parties to a contract are or are not part of the contract. Such a result-driven approach would provide neither the certainty nor the respect for state law (including for state law with which federal judges may disagree) that federalism commands.

Moreover, the context of Section 1821(e) calls for a strict distinction between "law" and "contract" here at least as much, if not more so, than in any case on which we rely. Although it was the basis for the principal argument that petitioners raised on remand, the decision below simply ignores that § 1821(e) does not apply to any "contract or lease" but rather to any "contract or lease . . . to which such institution *is a party*." (Emphasis added). It is certainly counter-intuitive to portray a savings and loan as a "party" to state

law. Being a "party" to a contract plainly connotes a voluntary, bargained-for obligation, not the imposition of state law and substantive policy choices. Indeed, Section 1821 is replete with terms that apply to voluntary undertakings and bargained-for provisions of a contract, but that have either no meaning or a very strained meaning when applied to obligations imposed by state statute or regulation. See, *e.g.*, §§ 1821(e)(1)(A) (receiver may "*disaffirm* or *repudiate* any contract or lease . . . ") (emphasis added), 1821(e)(1)(B) ("performance"); 1821(e)(5)(A) ("written lease"; "default"); 1821(e)(5)(A)(i) ("terminated"); 1821(e)(5)(A)(ii) ("term of the lease"); § 1821(e)(5)(B)(i)(I) ("the contractual rent"). Section 1821(e) was plainly intended to provide some protection from imprudent bargains struck by the savings and loan, not from the generally applicable economic and social laws and policies of a given state. When Congress in FIRREA intended to preempt obligations or requirements imposed by state law, it expressly preempted "State law." *E.g.*, 12 U.S.C. §§ 1463(g)(1), 1821(m)(10), 1823(k)(1)(A)(i). It did not do so here and the absence of the required congressional intent defeats RTC's preemption argument. See *supra*, at p. 13.

B.

The decision below also presents fundamental conflicts with two central holdings of *O'Melveny* and with decisions of other courts of appeals interpreting FIRREA.

1. The decision below improperly confines *O'Melveny* to an opinion solely on when to create federal common law and holds that *O'Melveny* is *not* instructive when the task is "definitions of terms used in a federal statute." App. 11a-13a. Indeed, the chief of litigation for the FDIC has accurately stated that the "2nd Circuit found that the *O&M* court was referring to remedies and causes of action, *not how to construe terms of a federal statute.*" "2nd Circuit Limits *O'Melveny* Scope," *Banking Attorney*, Feb. 6, 1995, at 2 (emphasis added). The Second Circuit is fundamentally wrong and its limitation of *O'Melveny* is entirely inconsistent with the first half of *O'Melveny*, which is expressly a decision on statutory

interpretation, specifically the meaning of "rights" in 12 U.S.C. § 1821(d)(2)(A)(i). See 114 S. Ct. at 2054.

The decision below also cannot be reconciled with *O'Melveny's* rejection of the government's "more money" arguments because that rejection is itself a statutory interpretation holding. *Id.* at 2055. *O'Melveny* canvassed the potentially relevant provisions of FIRREA, see *id.* at 2054, and held that nothing in "*FIRREA* . . . sets forth any anticipated level for the fund" or any "federal policy that the Fund should always win," *id.* at 2055 (emphasis added). The Second Circuit, however, effectively held that this Court did not look far enough and missed the pertinent statutory provision. Thus, the Second Circuit premised its holding that there were "no parallels" (App. 21a, 24a) between this case and *O'Melveny* on 12 U.S.C. § 1441a(b)(3)(C)(i), a provision of FIRREA which states that one of the RTC's "duties" is to "conduct the operations of the Corporation in a manner which . . . maximizes the net present value return from the sale or other disposition of . . . assets of such institutions."

There is no basis for distinguishing *O'Melveny* from this case based on 12 U.S.C. § 1441(b)(3)(C)(i). Rather, if the Second Circuit properly applied Section 1441a(b)(3)(C)(i), then *O'Melveny* was wrongly decided and *O'Melveny* would be rendered without effect in virtually all future RTC and FDIC cases. This is because 12 U.S.C. § 1821(d)(13)(E)(i) provides – identically to § 1441a(b)(3)(C)(i) – that when the *FDIC* as receiver succeeds to the "assets of any insured depository institution," the FDIC "shall conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets."[10]

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[10] Indeed, the chief of litigation for the *FDIC* has stated that the decision below is "significant" and "new" because it holds that preemption can be based on the "goals" of the statute, and that the FDIC therefore intends to use the decision in a variety of preemption contexts. "*Diamond* Upholds FDIC Stand On Preemption," *Banking Attorney*, Feb. 6, 1995, at 2. *See also RTC v. Grant Thornton*, 41 F.3d 1539, 1546 (D.C. Cir. 1994) (post-*O'Melveny* professional liability case in which RTC relied on § 1441a(b)(3)(C)(i)).

Ultimately, the rationale of the Second Circuit is indistinguishable from the rejected rationale of the Ninth Circuit in *O'Melveny* – *i.e.*, the Ninth Circuit also expressly reasoned that FDIC's claim against O'Melveny & Myers was an "asset" and that the "regulatory scheme" required the displacement of state-law limitations that "diminish[ ] the value of the asset pool held by the receiver and limit[ ] the receiver's discretion in disposing of the assets." *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 752 (9th Cir. 1992). In irreconcilable conflict with this Court's decision in *O'Melveny*, the Second Circuit has adopted the rejected rationale of the Ninth Circuit.

O'Melveny demonstrated the error (which the Second Circuit has repeated) in confusing the RTC or FDIC's duty to get the best price for an asset with the issue of what assets the receiver has in the first place. *O'Melveny* holds that 12 U.S.C. § 1821(d)(2)(A)(i) defines the assets to which the receiver succeeds. See 114 S. Ct. at 2054.[11] Under this provision the receiver "steps into the shoes of the failed S&L" and succeeds to its "rights" as subject to existing state-law limitations. *Id.* As *O'Melveny* holds, the receiver's desire for "more money" cannot wipe out the state-law limitations on the receiver's assets. *Id.* at 2055.

Under *O'Melveny's* interpretation of Section 1821(d)(2)(A)(i) then, the RTC here became owner of the Building apartments as subject to the existing, state-law imposed rent control tenancies of the individual petitioners. Section 1441a(b)(3)(C)(i) does nothing more than instruct RTC to maximize the value of that asset, *i.e.*, apartments subject to the existing tenancies. Under *O'Melveny*, that provision can offer no support for the Second Circuit's attempt to convert that asset into an entirely different asset – *i.e.*, apartments not subject to the existing tenancies.[12]

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[11] The RTC has correctly conceded that both Section 1821(d)(2)(A)(i) and Section 1821(e) are made applicable to the RTC as receiver by 12 U.S.C. § 1441a(b)(4)(A).

[12] *O'Melveny* also questioned whether, under the test of *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994), a substantive provision of FIRREA should be applied retroactively and, accordingly, petitioners

The Second Circuit's decision is also in conflict on this point with two decisions of the D.C. Circuit. Most apt is *Office & Prof. Employees Int'l Union v. FDIC*, 27 F.3d 598 (D.C. Cir. 1994) (Silberman, J.), where the receiver also argued that its repudiation powers under 12 U.S.C. § 1821(e) should be broadly construed to advance the fiscal purpose of FIRREA. The D.C. Circuit explained that this "observation does not address the specific question we face" because in Section 1821(e), "Congress did not eliminate *all*" state-law rights that might impede the receiver's desire for more money. *Id.* at 604. Accordingly, the court used traditional tools of statutory interpretation, without a thumb on the scale, to interpret and apply the lines drawn by Congress in Section 1821(e) itself. *Id.* See also *RTC v. Grant Thornton*, 41 F.3d 1539, 1546 (D.C. Cir. 1994) (Edwards, C.J.) (it is "unreasonable" to use the "general language" of § 1441a(b)(3)(C)(i) as a basis for broadly interpreting a more specific provision of FIRREA). The D.C. Circuit's method of interpreting FIRREA should have been used here. Section 1821(e) allows RTC to repudiate "contract" obligations, but it does not preempt all state law obligations. Section 1441a(b)(3)(C)(i)

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argued against retroactivity based on *Landgraf* on remand in this case. The court of appeals has conceded that the individual petitioners had a state-law created "interest in the property" (App. 19a) and that, under its interpretation of § 1821(e), FIRREA changed the law concerning repudiation of statutory tenancies, *id.* at 53a-56a. If the Second Circuit's interpretation of § 1821(e) were correct, then under *Landgraf*, § 1821(e) should not be applied to statutory tenancies created prior to the enactment of FIRREA. *See* 114 S. Ct. at 1500, 1505. The decision below is thus in conflict with *Landgraf*, with *Levine v. FDIC*, 1995 Fla. App. LEXIS 1282, at *9-*12 (Fla. App. Feb. 15, 1995), which holds that 12 U.S.C. § 1821(e)(1) should not be applied retroactively, and with *James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 227 (6th Cir. 1995), which holds that there can be no preemption of a state-law property interest created before enactment of a federal statute unless the *Landgraf* test for retroactivity is satisfied. *See also Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (en banc) (under *Landgraf*, new substantive provision in FIRREA is not retroactive).

simply has no role to play in defining what constitutes part of the "asset" or "contract" to which the receiver's powers apply.[13]

2. The court below incorrectly held that "[n]othing in *O'Melveny* . . . militates against" creating a federal statutory definition for "contract or lease" such that an obligation that is external to the contract under state law is part of the contract under the federal definition. App. 12a. The court of appeals could only reach this conclusion by ignoring that *O'Melveny* itself rejected defining the term "rights" under 12 U.S.C. § 1821(d)(2)(A)(i) to include tort claims that did not exist under state law.

In *O'Melveny*, the government argued that FIRREA "positively authorized" the displacement of state law for determining the claims of the FDIC or RTC acts as receiver. 114 S. Ct. at 2054. The key statutory provision at issue in *O'Melveny* was 12 U.S.C. § 1821(d)(2)(A)(i), which stated that FDIC succeeds to the "rights . . . *of the insured depository institution.*" (Emphasis added.) The Court held that the statutory reference to the "rights . . . of the insured depository institution" means that the FDIC asserts the rights of the savings and loan "that existed prior to receivership." 114 S. Ct. at 2054. It followed that "rights" under § 1821(d)(2)(A)(i) did not include claims that did not exist under state law because state law defined the rights of the savings and loan "prior to receivership." *Id.* In conflict with the Second Circuit, the Eleventh Circuit has recognized that the application of state law under the *O'Melveny* decision turns on the statutory interpretation of § 1821(d)(2)(A)(i). See *RTC v. Artley*, 28 F.3d 1099, 1102 (11th Cir. 1994).

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[13] The Second Circuit also erred in selectively choosing to ignore two other "duties" of the RTC set forth in Section 1441a(b)(3)(C)(ii) and (v), *i.e.*, to "minimize[ ] the impact of [its] transactions on local real estate and financial markets" and to "maximize[ ] the preservation of the availability and affordability of residential real property for low- and moderate-income individuals." *Cf. Landgraf*, 114 S. Ct. at 1508 ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.").

The language of 12 U.S.C. § 1821(e)(1) is very similar to the language of 12 U.S.C. § 1821(d)(2)(A)(i) interpreted in *O'Melveny*. Specifically, Section 1821(e)(1) carefully limits the repudiation power of the FDIC and RTC to "any contract or lease . . . *to which such institution is a party*." (Emphasis added.) As in *O'Melveny*, here the reference to the contract or lease to which the "institution is a party" means that the RTC may repudiate only contractual or lease obligations of the savings and loan "that existed prior to receivership." 114 S.Ct. at 2054. See, *e.g., Hudson United Bank v. Chase Manhattan Bank,* 43 F.3d 843, 847 n.6 (3d Cir. 1994) ("Subsection (e) deals with contracts made before appointment of the receiver."). Thus, when under the state law that governs prior to the receivership, an obligation imposed by state statute or regulation is not considered part of a "contract or lease . . . to which such institution is a party," then the obligation does not fall within the language of Section 1821(e)(1) and may not be repudiated consistently with *O'Melveny*.

Indeed, this approach is more strongly supported here under § 1821(e) than in *O'Melveny*. This is because the subjects of the provision here – real property and the definition of "contract or lease" – are even more deeply rooted in state law than is the more general term "rights" in § 1821(d)(2)(A)(i). See, *e.g., BFP v. RTC*, 114 S. Ct. at 1765 (applying state law on real property foreclosure to determine whether foreclosure was for "reasonably equivalent value" under the Bankruptcy Code); *Butner v. United States,* 440 U.S. 48, 54-55 (1979) (applying "state law" to "the determination of property rights" under the bankruptcy statute); *RFC v. Beaver County,* 328 U.S. 204, 210 (1946) ("application of settled state rules as to what constitutes 'real property' ").[14]

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[14] At least two circuit courts have applied state law to determine what is part of a "contract" or "lease" under 11 U.S.C. § 365(a). *See In re Topco, Inc.*, 894 F.2d 727, 734 n.17 (5th Cir. 1990); *In re Harris Pine Mills,* 862 F.2d 217, 220 n.5 (9th Cir. 1988). Similarly, two circuit courts have applied state law to determine what is part of an "agreement" under 12 U.S.C.

State law has been applied in federal statutory interpretation to construe terms relating to real property because such terms are "deeply rooted in state traditions, customs, habits and laws." *Id.* Moreover, this Court has indicated that the reasons for applying state law in construing a term or filling an interstice in a federal statute are strongest "in areas in which private parties have entered legal relationships with the expectations that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 98 (1991) (applying state corporate law under federal statute). This expectation interest supports application of state law on both real property issues and "contract" issues. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) ("contract" issues fall within the principle that, "[a]lthough we must do so when Congress *plainly* directs, as a rule we should be and are reluctant to federalize matters traditionally covered by state common law") (emphasis added; citation and quotations omitted).[15]

As demonstrated in Section II.A, *supra*, even assuming that the Second Circuit correctly refused to use state law to construe what is part of the "contract," under federal law, obligations imposed by state law on parties to a contract should not be considered part of the "contract" under the

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§ 1823(e). *See Bateman*, 970 F.2d at 928; *Patterson*, 918 F.2d at 544. The decision below is in conflict with these decisions.

[15] None of the cases cited by the court of appeals remotely supports that court's decision to construe "contract" more broadly than state law does. *RFC v. Beaver County*, 328 U.S. 204 (1946), involved the "application of settled state rules as to what constitutes 'real property.' " *Id.* at 210. *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 430 (1986), simply applied an over 100-word definition of "deposit" in 12 U.S.C. § 1813(l)(1) (1982). And, in *Molzof v. United States*, 112 S. Ct. 711 (1992), the language of the statute called for the application of state law to issues of liability, but excluded the issue of what constitutes "punitive damages" from that application. *Id.* at 714-15. Nonetheless, this Court defined punitive damages as damages "intended by state law . . . to act as punishment." *Id.* at 715 (quotations and citation omitted).

American Airlines-Cipollone - Romein line of cases. It is crystal clear, however, that the Second Circuit's decision to place rent control obligations concerning occupancy and rental amount within the "contract" is also flatly contrary to decades of New York decisional law. Indeed, only twenty days after the decision below, the New York Court of Appeals reaffirmed that the rent control "tenancy exists *not by contact but by operation of law.*" *Duell v. Condon*, 1995 N.Y. LEXIS 129, at *5 (N.Y. Feb. 9, 1995) (emphasis added). Accord, *e.g.*, *Stern v. Equitable Trust Co.*, 144 N.E. 578, 578 (1924); *Whitmarsh v. Farnell*, 83 N.E.2d 543, 547 (1949); *W.T. Assocs. v. Huston*, 472 N.Y.S.2d 562, 564 (N.Y. Sup. Ct. 1984) ("statutory tenants protected by the rent control laws . . . do not hold leases"); *Brown v. Denner*, 218 N.Y.S.2d 834, 837 (N.Y. Mun. Ct. 1961) (rent control "tenancy is not one resting in contract, express or implied").[16]

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[16] Lower state court decisions have expressly held that rent stabilized tenant's rights concerning occupancy and rental amount are also "not pursuant to any agreement . . . but solely by virtue of the emergency rent laws." *DeSantis v. White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991); *Park Summit Realty Corp. v. Frank*, 434 N.Y.S.2d 73, 76-77 (N.Y. Sup. Ct. App. Term 1980), *aff'd*, 448 N.Y.S.2d 414 (N.Y. App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982). The New York Court of Appeals has also indicated in dictum that the rent stabilized tenant's "right to continued occupancy" – the right at issue in this case – is statutory, but that other aspects of the rent stabilized landlord-tenant relationship are "contractual in nature." *Duell*, 1995 N.Y. LEXIS 129, at *5; *see also id.* at *12 ("we do not pass on the correctness of [rent stabilization] decisions").

In one cryptic footnote, the Second Circuit states in dictum that "even if New York law were to apply, the outcome would not change." App. 17a n.3. But the rest of the footnote goes on to explain merely that New York law agrees with the decision below on the narrow (and undisputed) point that a rent control tenancy *begins* with a consensual contract. *Id.* The Second Circuit has never suggested, even in dictum, that New York law agrees with the holding of the Second Circuit that the occupancy and rent obligations imposed on landlords that are contrary to that initial contract somehow become part of or depend on the contract. The cases cited above, including the subsequent decision in *Duell*, establish precisely the opposite.

In particular, and again contrary to the Second Circuit, the termination of the original contract under New York law does not somehow terminate the statutory tenancy obligations concerning occupancy and rent because under New York law those obligations are not part of the contract. See *Duell*, 1995 N.Y. LEXIS 129, at *5 (statute creates "right to continued occupancy . . . notwithstanding the expiration of the lease"); see also *Wasservogel v. Meyerowitz*, 89 N.E.2d 712, 715 (N.Y. 1949) (statutory tenants "stayed in possession, not under the original lease but as statutory tenants only"). New York's rent control statutes expressly provide that the possession and rent obligations imposed by those statutes apply "notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has *expired or otherwise terminated*, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." N.Y.C. Admin. Code § 26-408.a (emphasis added), codified after N.Y. Unconsol. L. § 8617 (McKinney 1987); see also, *e.g.*, N.Y. Unconsol. L. § 8585.1.[17]

* * *

In sum, this case squarely presents for review a recurring doctrinal issue – the standard for distinguishing between "law" and "contract" – that affects not just FIRREA, the Bankruptcy Code, and numerous other federal statutes, but

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[17] The result below should also be reversed because if "lease" means statutory tenancy under 12 U.S.C. § 1821(e), then "term of the lease" should mean "term of the [statutory tenancy]" under 12 U.S.C. § 1821(e)(5). *See, e.g., Gustafson v. Alloyd Co.*, No. 93-404, slip op. at 7-8 (U.S. Feb. 28, 1995). New York law holds that the tenant's "*statutory rights* . . . become the measure of his term." *Stern*, 144 N.E. at 578. Accordingly, the "term" of a statutory tenancy is "as long as the tenant continues to pay the rent" set by regulation. N.Y. City Rent Stabilization Code, N.Y. Comp. Codes R. & Regs. §§ 2522.5(b)(2), 2524.1(a), codified after N.Y. Unconsol. L. § 8617; N.Y.C. Admin. Code § 26-408.a.

preemption doctrine generally. The decision below also presents fundamental conflicts with *O'Melveny* and other circuits court decisions interpreting FIRREA. But the doctrinal importance of this case is exceeded by its practical importance. This Court's decision will lead to or prevent the eviction of thousands of families from their homes in New York and a substantial number of other States. The practical impact of this case on the lives of those tenants dwarfs the impact of *American Airlines* on frequent fliers, or of *O'Melveny* on lawyers. This Court may well not consider another case in the upcoming Term that more directly and dramatically affects the day-to-day lives of so great a number of Americans.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55 – August Term, 1993

(Submitted: November 23, 1994 Decided: January 20, 1995)

Docket No. 92-6244

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Plaintiff-Appellant,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER, ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,

Defendants-Appellees,

and

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Appellee.

Before: PRATT, McLAUGHLIN and JACOBS, *Circuit Judges.*

Resolution Trust Corporation, as receiver for a failed savings and loan, brought action to repudiate leaseholds of nine apartments owned by the savings and loan. New York State brought separate action against Resolution Trust Corporation, alleging that repudiation of leaseholds violated State rent regulations. Actions were consolidated by United States District Court for the Southern District of New York (Carter, *J.*), which granted summary judgment to state and tenants. *Resolution Trust Corp. v. Diamond,* 801 F. Supp. 1152 (S.D.N.Y. 1992). The Court of Appeals reversed and remanded for entry of judgment in favor of Resolution Trust Corporation. *Resolution Trust Corp. v. Diamond,* 18 F.3d 111 (2d Cir. 1994). The United States Supreme Court, *Solomon v. Resolution Trust Corp.,* 115 S. Ct. 43 (1994), granted certiorari, vacated and remanded for reconsideration in light of *O'Melveny & Myers v. FDIC,* 114 S. Ct. 2048 (1994).

Previous decision reinstated, with one modification affecting the remaining lease term of rent controlled tenancies.

DENNIS S. KLEIN, Washington, DC (Hughes Hubbard & Reed, Washington, DC, of counsel), *for Plaintiff-Appellant Resolution Trust Corporation.*

CARTER G. PHILLIPS, Washington DC (Richard D. Bernstein, Peter D. Keisler, Sidley & Austin, Washington, DC, on the brief) *for Defendants-Appellees Lillian Solomon, Horace Solomon, Ira Kaufman, Peggy Lehman, and Denise Tucker-Kellen.*

G. OLIVER KOPPELL, Attorney General of the State of New York (Gary R. Connor, Karen S. Smith, Assistant Attorneys General, New York, NY, on the brief) *for Defendants-Appellees G. Oliver Koppell, Attorney General of the State of New York, Donald Halperin, Commissioner of the Division of Housing and Community Renewal for the State of New York, and Selma Diamond, and for Appellee New York State Division of Housing and Community Renewal.*

DON D. BUCHWALD, New York, NY, *for Defendant Appellee Susan Solomon Pattullo.*

COLLEEN F. McGUIRE, New York, NY, *for Defendant-Appellee Lloyd Ribner, as Executor of the Estate of Muriel Ribner, deceased.*

JACOBS, *Circuit Judge:*

This matter returns to us following a remand by the Supreme Court. *See Solomon v. Resolution Trust Corp.*, 115 S. Ct. 43 (1994). Our previous decision reversed an order granting summary judgment in favor of the tenants and the state, and remanded to the district court with instructions to enter judgment for the Resolution Trust Corporation ("RTC"). *Resolution Trust Corp. v. Diamond*, 18 F.3d 111 (2d Cir. 1994).[1] The Supreme Court vacated that decision, and remanded for reconsideration in light of its

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[1] Our decision also addressed separate issues involving Lloyd Ribner, a defendant claiming a right of succession to the tenancy of his deceased mother, Muriel Ribner. We conclude

decision in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), an opinion issued several months after our opinion in *Diamond*.

Having carefully considered *O'Melveny*, as well as the briefs contesting its proper impact on *Diamond*, we now reinstate our previous decision, with one modification affecting the remaining lease term of rent controlled tenancies, and we remand with instructions that the district court enter judgment for RTC in accordance with this opinion and the reinstated opinion.

Background

A. The Facts.

A full statement of the facts is in our previous decision. We presume familiarity with that opinion, and recount here only the few facts that bear upon the impact of the Supreme Court's decision in *O'Melveny*.

The individual tenant-defendants occupy rent-regulated condominium apartments in New York City that are now owned by the RTC – as receiver for the failed Nassau Savings and Loan Association, F.A. In late 1990 and early 1991, the RTC repudiated the leasehold interests of the tenants pursuant to authority granted by the Financial Institutions Reform, Recovery, and Enforcement Act of

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that *O'Melveny* does not affect the issues addressed in that part of our decision, and therefore reinstate without modification the section of the opinion addressing Ribner without further comment.

1989 ("FIRREA"). *See* 12 U.S.C. § 1821(e)(1). After encountering resistance from the tenants and New York's Attorney General, the RTC filed a complaint in the United States District Court for the Southern District of New York, asking for (*inter alia*) a declaration that the RTC possessed the repudiation power that it had exercised. New York countered with a separate lawsuit that was consolidated with the RTC's case. After briefing by the parties, the district court concluded that these tenancies were "statutory tenancies" rather than traditional leaseholds and that the RTC therefore lacked the power under FIRREA to repudiate them. The district court accordingly entered summary judgment in favor of New York and the tenants.

We reversed the district court's decision, vacated the grant of summary judgment to New York and the tenants, and ordered that judgment be entered for the RTC. In so doing, we held that the tenancies at issue – albeit "statutory tenancies" according to state law – where nevertheless rooted in lease or contract, and were therefore subject to the RTC's repudiation power. *Diamond*, 18 F.3d at 121. Under FIRREA, after RTC repudiation, the tenant may choose to "remain in possession of the leasehold interest for the balance of the term of the lease. . . . " 12 U.S.C. § 1821(e)(5)(A)(ii). In deciding the remaining term of these rent-regulated tenancies, we looked to state law, and concluded that rent-stabilized tenants could remain until the expiration of their current lease, and rent-controlled tenants could remain until expiration of a two-year period "commencing on the January 1 of the last biennial review set by the statute prior to notice of repudiation." 18 F.3d at 124. New York and the tenants filed a

petition for a writ of certiorari. In *Solomon v. Resolution Trust Corp.*, 115 S. Ct. 43 (1994), the Supreme Court remanded this matter to us for reconsideration in light of *O'Melveny*.

B. The *O'Melveny* decision.

O'Melveny involved a suit brought in 1989 by the FDIC, acting as receiver for a failed savings and loan ("S & L"), against the law firm that had represented the S & L in two 1985 real estate syndications. The FDIC asserted state-law tort claims of professional negligence and breach of fiduciary duty. The defendant law firm, O'Melveny & Myers, successfully moved for summary judgment on the grounds (1) that it owed no duty to the bank or its affiliates to uncover the S & L's own fraud; (2) that knowledge of misconduct by S & L officers is imputed to the S & L, and therefore to a receiver that stands in its shoes; and (3) that the FDIC was estopped by that imputed knowledge from pursuing its tort claims against the law firm. *O'Melveny*, 114 S. Ct. at 2052. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the law firm. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992).

The Supreme Court granted certiorari to consider two issues: (1) whether federal common law, rather than state law, "determines whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation;" and (2) even if state law decides that question, whether federal common law will "determine[] the more narrow question whether knowledge by officers so acting will be imputed to the FDIC

when it sues as receiver of the corporation." *O'Melveny*, 114 S. Ct. at 2052.

Noting that "the FDIC was asserting in this case causes of action created by California law," the Court answered the first question in the negative, finding the Ninth Circuit's reliance on federal common law "plainly wrong." *Id.* The circuit court had relied on three cases in divining a federal common-law basis for its decision. The Supreme Court distinguished those cases on the principle that, while a federal cause of action may be governed by federal policies, state-law causes of action are properly governed by state law:

> In *Cenco*, where the cause of action similarly arose under state common law, the Seventh Circuit's analysis of the "circumstances under which the knowledge of fraud on the part of the plaintiff's directors [would] be imputed to the plaintiff corporation [was] merely an attempt to divine how Illinois courts would decide that issue." *Schacht*, 711 F.2d, at 1347 (citing *Cenco*, 686 F.2d, at 455). Likewise, in *Investors Funding*, the District Court analyzed the potential affirmative defenses to the state-law claims by applying "[t]he controlling legal principles [of] New York law." 523 F. Supp., at 540. In *Schacht*, the Seventh Circuit expressly noted that "the cause of action [at issue] arises under RICO, a federal statute; we therefore write on a clean slate and may bring to bear federal policies in deciding the estoppel question." 711 F.2d, at 1347.

O'Melveny, 114 S. Ct. at 2053 (discussing *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), *In re Investors Funding Corp. of N.Y. Securities Litigation*, 523 F.

Supp. 533 (S.D.N.Y. 1980), and *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983)) (alterations in original). We quote this passage at length because, as discussed below, it furnishes a principal point of distinction from *Diamond*.

The Supreme Court in *O'Melveny* "turn[ed], then, to the more substantial basis for the [Ninth Circuit decision], which asserts federal pre-emption not over the law of imputation generally, but only over its application to the FDIC suing as receiver." 114 S. Ct. at 2053. That question is made to depend in part, on the statutory provision that provided the FDIC with the authority to bring the action in the first instance – 12 U.S.C. § 1821(d)(2)(A)(i) – which is captioned "Powers and duties of [the FDIC] as . . . receiver," and which states that "the [FDIC] shall . . . by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution. . . . " The *O'Melveny* opinion construed this language to place the FDIC as receiver "into the shoes of the failed S & L, obtaining the rights of the insured depository institution that existed prior to receivership." *O'Melveny*, 114 S. Ct. at 2054 (internal quotations and citations omitted).

The Court rejected the FDIC's argument that this statutory provision "should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law," concluding that the argument is "demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *Id.* (citing, *inter alia*, 12 U.S.C. §§ 1821(e)(1), (3)). Because Congress demonstrated that it could provide a federal rule of decision where it so

intended, it became "hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*

That, however, did not completely put the appeal to rest. The Court noted that the FDIC's receivership began in 1986, some three years prior to the effective date of FIRREA. Reluctant to address the question of FIRREA retroactivity where the issue had not been briefed by the parties, the Court instead proceeded to analyze the case "assuming the inapplicability of FIRREA. . . . " 114 S. Ct. at 2055. The outcome did not change. The Court ruled that the FDIC could not prevail because its claim was not "one of those cases in which judicial creation of a special federal rule would be justified." *Id.* The judicial creation of a federal rule of decision is justified only to resolve a " 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). In *O'Melveny*, "[t]he closest [the FDIC came] to identifying a specific, concrete federal policy or interest that is compromised by California law [was] its contention that state rules regarding the imputation of knowledge might 'deplet[e] the deposit insurance fund.' " 114 S. Ct. at 2055 (quoting FDIC brief). The court rejected this argument emphatically:

> neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what [the FDIC] must mean by "depletion" is simply the foregoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund.

> That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here.

Id. (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737-38 (1979); *United States v. Yazell*, 382 U.S. 341, 348 (1966)).

The Court found no more persuasive the FDIC's even broader argument that it would somehow " 'disserve the federal program' " to permit state law to create defenses to lawsuits that would "impos[e] costs 'on the nation's taxpayers, rather than on the negligent wrongdoer.' " *O'Melveny*, 114 S. Ct. at 2055 (quoting FDIC brief). In short, the Court categorically rejected arguments that do no more than "demonstrate[] the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.* Holding that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted," *id.* at 2056, the Court reversed the decision, and remanded to the Ninth Circuit to decide what the state law actually provides.

Discussion

O'Melveny furnishes ordering principles by which we can test our decisions on key issues in this case. We

conclude that these ordering principles justify our original conclusions and validate our original analysis.

The Court's conclusion in *O'Melveny* is fully applicable to this case: "this is not one of those extraordinary cases in which the *judicial* creation of a federal rule of decision is warranted." 114 S. Ct. at 2056 (emphasis added). We never believed otherwise. Rather, this case is one (quoting *O'Melveny* again) in which the cause of action arises out of a "provision[] of FIRREA which specifically create[s] [a] special federal rule[] of decision. . . ." *Id.* at 2054 (citing, *inter alia,* 12 U.S.C. § 1821(e)(1)). That Congressionally-created rule of decision expressly grants the RTC the power to abrogate valid contracts and leases where the agency has determined that they are burdensome. Unless the RTC repudiates a burdensome contract or lease, the law of each state will furnish the contract principles that govern the relationship; the RTC, like the FDIC in *O'Melveny,* steps into the shoes of another entity having claims, rights, powers and causes of action defined and limited by state law. However, when the RTC *does* exercise its federally-granted power to repudiate a contract or lease, its power to do so is not subordinated to state statutes or regulations. Section 1821(e)(1) is an express grant of federal power exercisable in derogation of all contrary state law, and it therefore supersedes – or preempts – volumes of state law. This distinction is drawn in *O'Melveny,* where "the FDIC was asserting . . . causes of action created by [state] law," 114 S. Ct. at 2052, and confirms the result in *Diamond.*

Nevertheless, in order to assure that our opinion is analytically congruent with *O'Melveny* throughout, we need to declare certain premises that were left implicit in

our earlier opinion, refine some terms of reference, and address specifically the arguments that New York and the tenants predicate upon *O'Melveny*. Thus we now undertake to clarify *Diamond*, modifying it in the single respect referenced earlier.

A. Construction of phrase "contract or lease."

In *Diamond*, we framed as a central issue whether the tenancies in question had the nature of a "contract or lease," and were therefore subject to the RTC's repudiation power. We stated that, "[f]or these purposes, the definition of the phrase 'contract or lease' is a matter of federal law." 18 F.3d at 118. Nothing in *O'Melveny* (or in the many cases cited by New York and the tenants in their latest briefing) militates against that approach.[2]

New York and the tenants point to the *O'Melveny* principle that we may not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny*, 114 S. Ct. at 2054. According to New York, this means that words and terms that are not expressly defined in FIRREA must be construed according to New York law. We disagree. Our reading of the cases cited by the Court following this quotation demonstrates to us that the Court had in mind

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[2] As discussed below, we did, however, use longstanding common-law principles to inform our decision. Thus we used, rather than ignored, state law in defining the terms.

court-created *remedies and causes of action*, not definitions of terms used in a federal statute.

Thus, in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), the Court held that there is no implied right of contribution in either Title VII of the 1964 Civil Rights Act or in the Equal Pay Act: "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." 451 U.S. at 97. However, the meaning of words in a federal statute is a different matter: "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Id.*

In the other case cited in *O'Melveny, City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), the Court held that a comprehensive legislative scheme enacted by Congress displaces previously created federal common-law rights of action. *See id.* at 319 ("The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when [the Court created a common-law right of action], strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.") This is an entirely uncontroversial proposition and does not affect in the least our reading of FIRREA.

Our decision in *Diamond* does not (and did not purport to) write federal common law; we did not create a new remedy, cause of action, or rule of decision. We construed the language of a federal statute that by its own terms created a rule of decision; and that enterprise is, and always has been, a matter of federal law. *See Molzof v. United States*, 112 S. Ct. 711, 715 (1992) ("the meaning of the term "punitive damages" as used in [28 U.S.C.] § 2674, a federal statute, is by definition a federal question"); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431 (1986) (federal law governs meaning of "deposit" in federal statute); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 208 (1946) ("Pennsylvania's definition of 'real property' cannot govern if it conflicts with the scope of that term as used in the federal statute. What meaning Congress intended is a federal question which we must determine."); *Schacht v. Brown*, 711 F.2d 1343, 1347 (7th Cir. 1983) ("the cause of action [at issue] arises under . . . a federal statute; we therefore write on a clean slate and may bring to bear federal policies in deciding the . . . question.") (quoted in *O'Melveny*, 114 S. Ct. at 2053).

Our project in *Diamond* was to construe the term "contract or lease" in order to decide whether the tenancies at issue fall within the scope of the federal statute. We therefore asked "whether the tenancies in question are contractual in nature or whether the various rent regulations transformed these tenancies into some non-contractual, non-leasehold property interest such that they are outside the scope of the statute." 18 F.3d at 118. To answer that question, we looked to generally applicable, longstanding principles of law. *See, e.g., id.* ("[a]

tenancy is an interest in the exercise of dominion over property for a fixed or computable duration . . . initiated by a voluntary contractual arrangement between the landlord and tenant. . . . ") (citing Restatement (Second) of Property § 1.4 (1977); N.Y. Gen. Oblig. Law § 5-703 (McKinney 1989)). Our holding – that rent-regulated tenancies are subject to disaffirmation or repudiation by the RTC – was based on the conclusion that these tenancies "are contract-based leaseholds", 18 F.3d at 121, and we therefore rejected New York's argument that the tenancies were purely creatures of statute outside the reach of § 1821(e).

It is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 115 S. Ct. 382, 384 (1994) (citing *Molzof*, 112 S. Ct. at 715). In *Molzof*, the inquiry was "the meaning of the term 'punitive damages' as used in the [Federal Tort Claims Act]." 112 S. Ct. at 714. Although the ultimate issue was the recoverability of certain damages under Wisconsin law, the Court never referred to the law of Wisconsin in defining the term. Rather, it stated that " '[p]unitive damages' is a legal term of art that has a widely accepted common-law meaning; . . . . a long pedigree in the law." *Id.* at 715. The Court looked to generic principles and sources of common law, including definitions contained in editions of law dictionaries current when the statute was adopted. *See id.* (citing to Black's Law Dictionary 501 (3d ed. 1933); The Cyclopedic Law Dictionary 292 (3d ed. 1940)). In so doing, the Court was simply adhering to "[a] cardinal rule of statutory construction":

> '[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'

Molzof, 112 S. Ct. at 716 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

These principles underlie our analysis in *Diamond*. FIRREA grants the RTC power to disaffirm or repudiate any "contract or lease" that it has found to be burdensome. A contract is "[a] promissory agreement between two or more persons that creates, modifies, or destroys a legal relation." Black's Law Dictionary 394 (4th ed. 1951). A lease is a species of contract – an "agreement which gives rise to [the] relationship of landlord and tenant." *Id.* at 1035. The lease is a "[c]onveyance, grant or devise of realty for [a] designated period with reversion to [the] grantor." *Id.* at 1035 (citing *Becker v. Manufacturers Trust Co.*, 30 N.Y.S.2d 542, 544 (N.Y.App.Div. 1941)). The "tenant" is "one who has the temporary use and occupation of real property owned by another person, (called the 'landlord,') the duration and terms of his tenancy being usually fixed by an instrument called a 'lease.' " *Id.* at 1635.

We read New York's submissions to make two arguments in various ways: (1) that rent regulated tenancy in

New York is a creature of statute, and fully non-contractual in nature;[3] and (2) that, in any event, nothing in

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[3] Thus, according to New York, a tenant's right to remain in possession of a rent-regulated dwelling derives solely from the emergency rent laws. This is an argument we first encountered and addressed in *Diamond*. Our discussion there reflects our conclusion that, even if New York law were to apply, the outcome would not change:

> The voluntary and contractual aspects of the rent-control [and rent-stabilization] arrangement[s] distinguish [them] from the kind of housing measure invalidated by the New York Court of Appeals as an unconstitutional taking in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, *cert. denied*, 493 U.S. 976 (1989). There, the Court of Appeals struck down a local ordinance requiring owners of properties used as single-room occupancy housing ("SROs") to rehabilitate their buildings for use as SROs indefinitely, and contrasted that with rent regulations such as those in this case: "[t]he rent-control and other landlord-tenant regulations that have been upheld . . . merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing." 544 N.Y.S.2d at 548. The SRO ordinance was found to be a *per se* taking because its coercive design eliminated the voluntary and contractual nature of the landlord-tenant relationship, and " 'interfere[s] so drastically' . . . with the SRO property owners' fundamental rights to possess and exclude." 544 N.Y.S.2d at 548. . . .

Diamond, 18 F.3d at 121. Because we hold that a rent-regulated tenancy is contractual, we have no occasion now to resolve the issue we framed in *Diamond:* that New York's rent-regulations – were they to fully displace a voluntary and contractual tenancy with a pure statutory right to possession of the property – might be vulnerable to the same takings challenge that succeeded in *Seawall*.

FIRREA allows the RTC to abridge the tenants' statutory right to avoid eviction so long as the state-prescribed rent is paid.

O'Melveny does not make more tenable the argument that these tenancies are statutory and not contractual. First, as discussed above, Congress is presumed to have intended the *common-law* meaning of terms it uses without express definition. A "lease" is a contract conveying a temporary interest in real property, with reversion to the grantor. A contract that is subject to statutory regulation is a contract still. When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law. *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1164 (1991); *2 Tudor City Place Associates v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir.), *cert. denied*, 112 S. Ct. 83 (1991). With respect to residential tenancies, state law may introduce terms or provisions directly into the contract. *See Diamond*, 18 F.3d at 118 (discussing examples of terms imposed on residential leases, as well as certain terms rendered unenforceable by state law).

The tenancies in this case are no different. In each instance, the landlord-tenant relationship was created by a lease, as was the temporary interest in the property. New York's regulations expressly provide that "[t]he provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with the Rent Law or these regulations." N.Y.Comp.Codes R. & Regs. tit. 9, § 2200.13; *see also id.* at § 2520.12 (same). Thus many of the original lease terms are unaffected by New York's

rent regulations. Although the landlord-tenant relationship has been made subject to a variety of laws, including the obligations imposed by New York's rent regulations, the tenancy itself – the interest in the property – was created by the lease. Congress could not have intended that the RTC would have the power only to disaffirm or repudiate a piece of paper, or certain sections of that document. Rather, Congress must have intended that the repudiation reach the relationships and interests that the document creates. Section 1821(e) therefore confers the power to repudiate or disaffirm the grant or conveyance of the property interest, *i.e.*, the temporary estate in property held by the tenant. Once this "determination" of the temporary estate has occurred, possession reverts to the holder of the fee simple – the owner, who in this case is the RTC. *See Baker v. Latham Sparrowbush Assoc.*, 808 F. Supp. 992, 1008-09 (S.D.N.Y. 1992) (under N.Y. law, possession reverts to owner upon termination of tenancy); *see also* N.Y. Estates, Powers and Trusts Law § 6-4.4 (McKinney 1992) ("A reversion is the future estate . . . left in the creator . . . upon the simultaneous creation of one or more lesser estates. . . . "). In short, we reaffirm our original conclusion: the rent regulations at issue here "merely involve[ ] restrictions imposed on existing tenancies. . . . " *Seawall Associates v. City of New York*, 554 N.Y.S.2d 542, 548, 542 N.E.2d 1059, 1064 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). Therefore, the tenancies are fully subject to the RTC's repudiation power.

B. New York's anti-eviction provisions.

In our original opinion we did not address New York's claim that the tenant's statutory freedom from

eviction survives repudiation. Under New York's rent regulations, the landlord is forbidden (except under certain limited circumstances) from evicting any tenant who proffers the monthly rent payments in a timely manner. *See* N.Y.Comp.Codes R. & Regs. tit. 9, § 2524.1(a) ("As long as the tenant continues to pay the rent . . . no tenant shall be denied a renewal lease or be removed from any housing accommodation", except on specified grounds) (governing rent-stabilized tenancies); *see also* N.Y.City Admin.Code § 26-408a ("No tenant, so long as he or she continues to pay the rent . . . shall be removed from any housing accommodation which is subject to rent control- . . . notwithstanding the fact that the tenant has no lease or that his or her lease . . . has expired or otherwise terminated. . . . ". Do these anti-eviction laws bar the RTC from effecting a complete dissolution of the tenancy? That question requires us to address an issue we did not reach in our prior opinion: "conflict" preemption. *See Diamond*, 18 F.3d at 125 ("Having held that § 1821(e) expressly authorizes RTC to repudiate the tenancies at issue, we have no occasion to reach or address 'conflict' preemption. . . . "). We did not reach the issue because rent-regulated tenancies are contractual and thus fall within the express scope of FIRREA. We still adhere to this view; however, we should have directly addressed the more narrow question of whether, after repudiation, the RTC is still bound by the rent regulations to accept the state-regulated rent in exchange for the tenant's continued occupation of the property. We do not think that New York's rent regulations bar the RTC from taking steps necessary to fully effect a repudiation of the tenancy.

It is basic that the supremacy clause of the Constitution "invalidates state laws that 'interfere with or are contrary to, the laws of congress. . . . ' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)). Although preemption may arise in several ways, only one concerns us: "when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Michigan Canners & Freezers Assoc., Inc. v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Such "conflict" preemption will be found where "state law . . . interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

The goal of FIRREA is to stem the "financial hemorrhaging" resulting from the large number of failures in the thrift industry. *See Diamond*, 18 F.3d at 113. To that end, "Congress required that RTC conduct its operations 'in a manner which [ ] maximizes the net present value return from the sale or other disposition of' thrift assets that come into its hands." *Id.* (quoting 12 U.S.C. § 1441a(b)(3)(C)(i), and citing S.Rep. No. 19, 101st Cong., 1st Sess. 352 (1989)). It is pursuant to this overarching mandate that "Congress armed [RTC] with the power to disaffirm or repudiate contracts or leases that RTC in its discretion determines to be burdensome." *Id.* (citing 12 U.S.C. § 1821(e)(1)).

Therefore, the entire purpose underlying RTC's repudiation power is the maximization of return on assets. To

that end, Congress conferred on the RTC power to repudiate leases it deems burdensome. Here, the burden is the regulated rent and the diminished asset value that the rent-regulation causes. A state law that obliged the RTC to accept the tenancy in exchange for the regulated rent payment would simply continue the (repudiated) leasehold subject to the same burden. It is obvious that this state of affairs would nullify the FIRREA power to repudiate burdensome leases.

We are mindful that when analyzing a preemption issue we must be more deferential where a state is exercising its traditional police powers. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But where there is a direct and irreconcilable conflict, the state law must yield. *See Michigan Canners & Freezers*, 467 U.S. at 469. General preemption "principles are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Savings & Loan Assoc. v. De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

In this case, the non-eviction aspect of the state's rent-regulation scheme directly interferes with the "accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners & Freezers*, 467 U.S. at 469 (citations omitted). The tenancies at issue are rooted in contract; RTC has the power to repudiate the contracts, and therefore the underlying tenancies. If the

state anti-eviction law were to govern, the repudiation would be fruitless. We therefore hold that, to the extent that the anti-eviction provisions of New York's rent regulations interfere with the operation of § 1821(e), the state regulations and laws are preempted by FIRREA.

C. The "term of the lease."

Having reaffirmed our holding in *Diamond* that these tenancies are subject to repudiation by the RTC, we now address one final issue – the remaining leasehold term. "Once RTC repudiates a lease, a tenant may choose to 'remain in possession of the leasehold interest for the balance of the term of the lease. . . . ' " *Diamond*, 18 F.3d at 123 (quoting 12 U.S.C. § 1821(e)(5)(A)(ii)). Although the definition of "term," like that of "contract or lease," is a federal question, the meaning of that word is not at issue; the issue here is the substantive question of the specific time period of the term for rent-regulated tenancies. *O'Melveny* counsels that, where Congress has not provided a specific rule of decision, the courts should look to state law to fill in these interstices. In respect of FIRREA then, what that term is in any particular case, is a matter of contract provisions or state law.

In our prior opinion, we rejected the argument of New York and the tenants that the term of a rent-regulated lease under New York law is essentially perpetual, lasting for so long as (a) the tenant continues to pay the regulated monthly rent and (b) the World War II housing crisis is perpetuated. *Diamond*, 18 F.3d at 123. We did so because "the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and

cannot be construed fairly to accommodate so prolonged a residual tenancy." *Id.* Moreover, we decided that we could not use New York's "statutory occupancy rights to delimit the leasehold for FIRREA purposes" because a perpetual term might run afoul of takings jurisprudence. *Id.* at 123-24 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Block v. Hirsch*, 256 U.S. 135, 157 (1921)).

We adhere to that view. Having held that the RTC has the power to repudiate rent-regulated tenancies, we could not permit the state to nullify the RTC's federal power by imposing a residual lease term that runs in perpetuity; nor, for the same reason, could we accept a term measured by a tenant's willingness to continue to pay rent (at the previous rate). The foregoing discussion of conflict preemption applies with equal force to this issue. Were the term under state law to run in perpetuity, or be subject to the will of the tenant, a situation would arise where "state law . . . interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). A perpetual lease term would cement what the RTC has determined to be a "burdensome" relationship, thereby impeding its efforts to maximize the economic return on assets.[4] Such a result is barred by the doctrine

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[4] In their briefs, New York and the tenants equate this view with the "more money" argument rejected in *O'Melveny*. *See* 114 S. Ct. at 2048. We see no parallels. In *O'Melveny*, the federal court presumed that the general goal of asset maximization warranted overriding state-law defenses to state-law claims; here, Congress has expressly done so. *See* 12 U.S.C. § 1441(b)(3)(C)(i). In *O'Melveny*, the federal court adopted rules

of preemption, because it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Michigan Canners & Freezers*, 467 U.S. at 469 (citations omitted).

For this reason, we held in *Diamond* that the term of a rent-stabilized tenancy would run to the expiration of the current lease. 18 F.3d at 123. For rent-controlled tenancies, looking for the strongest analogy to a lease expiration, we held that "the lease term ends, . . . on the biennial January 1 date on which the landlord next becomes entitled (following the notice of repudiation) to a review of the maximum base rent." *Id.* at 124. On reconsideration, however, we have noticed a potential problem with this holding: if the repudiation occurs immediately prior to that January 1 date, the remaining lease term calculated this way could be as short as several days or weeks. This would, of course, serve the federal scheme. However, this federal scheme is displacing state laws and regulations adopted pursuant to the state's police power. Since preemption is particularly disfavored where a state's police power is at issue, we ought to accommodate – as best as we can – the state interest at stake. *See, e.g., Cipollone*, 112 S. Ct. at 2617 (" 'the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that

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of decision to implement that goal; here, the repudiation is effected by the agency itself – pursuant to an express grant of statutory power. In *O'Melveny*, the federal court decided what burdens warranted superseding state common law; here, the RTC is granted express statutory authorization to exercise its discretion in deciding which leases are "burdensome." *See* 12 U.S.C. § 1821(e).

[is] the clear and manifest purpose of Congress.' ") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That state interest looks unfavorably upon remedies which provide for immediate eviction of the tenant. *See, e.g., Manocherian v. Lenox Hill Hosp.*, 1994 WL 576191, at * 6 (N.Y. Oct. 20, 1994) ("central, underlying purpose of the [Rent Stabilization Law] is to ameliorate the dislocations and risk of widespread lack of suitable dwellings"); *but see id.* at * 8 ("another goal of the [Rent Stabilization Law] . . . [is] to free up apartments, fairly and appropriately, as soon as practicable").

Fortunately, there is a close analog in state law that balances these competing objectives. In reconsidering our previous opinion, we reviewed legislation, recently enacted in New York, that implements the de-regulation of tenancies for which the monthly rent exceeds $2,000 and the annual family income of the tenant exceeds $250,000 for the two preceding calendar years. *See* 1993 Sess. Law News of N.Y., 216th Legislature, Ch. 253 (McKinney's 1993) (codified at various places in N.Y. Unconsol.L., Tax L.); *see, e.g.*, Admin. Code of City of New York §§ 26-403.1 (rent control de-regulation); 26-504.3 (rent stabilization de-regulation). This law calculates when the regulated tenancy expires, after income reporting by tenants in higher-rent dwellings and certification by the landlord to the state that the pre-conditions have been met. For rent-stabilized dwellings, de-regulation occurs "upon the expiration of the lease." Admin. Code of City of New York § 26-504.3(b). That coincides exactly with our ruling in *Diamond*. For rent-controlled dwellings, de-regulation occurs "as of the first day of June in the year next succeeding the filing of the

certification of the owner." *Id.* at § 26-403.1. Measured from the date the tenant is required to return the income reporting form to the landlord (no later than May 31), the de-regulation of a rent-controlled tenancy occurs one year later.[5] In deference to state law (which, under *O'Melveny*, governs this area), we adopt this framework, which is the closest analog we find to the RTC's repudiation of tenancies in this case.

Conclusion

For the foregoing reasons, upon reconsideration after remand, we reinstate our previous opinion, *Resolution Trust Corp. v. Diamond*, 18 F.3d 111 (2d Cir. 1993), except for the holding in respect of the post-repudiation rights of rent-controlled tenants. For each such tenant, the term of the tenancy shall expire one year from the date the tenant was served with notice of the RTC's election to repudiate the lease. The district court is directed to re-enter judgment consistent with our two opinions.

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[5] The law also provides that, where the tenant refuses to return the form to his landlord, the landlord may have the State check the tenant's income tax records and certify that the tenant's income has exceeded the statutory threshold for de-regulation of rent. Admin. Code of City of New York § 26-403.1(c)(1). In such instances, where the tenant fails to cooperate, de-regulation occurs on March 1 of the next year. § 26-403.1(c)(2).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of JANUARY, one thousand nine hundred and ninety-five,

Resolution Trust Corporation, Plaintiff-Appellant, v. Diamond, *et al.*, Defendants-Appellees.	92-6244 (Filed Jan. 31, 1995)

A motion having been made herein by defendants-appellees to certify questions to the New York Court of appeals, upon consideration thereof, it is ordered that said motion be and it hereby is denied as moot in light of the opinion issued on remand.

/s/ Geo. C. Pratt (per DGJ)

/s/ Jos. M. McLaughlin (per DGJ)

/s/ Dennis G. Jacobs
Circuit Judges

GCP JMcL DGJ

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 92-6244

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Plaintiff-Appellant,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER, ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants-Appellees,

and

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee.

December 20, 1993, Argued

March 2, 1994, Decided

JUDGES: Before: PRATT, McLAUGHLIN and JACOBS, Circuit Judges.

OPINION

JACOBS, Circuit Judge:

Resolution Trust Corporation ("RTC") is a government corporation that acts as receiver or conservator for federally-insured thrift institutions in financial distress. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), directs RTC to realize a maximum recovery on the value of the thrift assets that come into its possession, and has conferred on RTC a number of extraordinary powers to help it in doing so. Among the powers granted to RTC by Congress is the power to disaffirm or repudiate the contracts or leases which it finds to be burdensome. RTC came into possession of nine occupied condominium apartments located at 444 East 57th Street in New York City, and has sought to disaffirm or repudiate the nine tenancies, each of which is subject to local and state rent regulation. The United States District Court for the Southern District of New York (Carter, J.) granted summary judgment to the tenants and New York State and denied summary judgment to RTC on the ground that the tenancies in question, by virtue of the rent regulation laws, are "statutory" tenancies rather than leases or contracts subject to disaffirmation or repudiation by RTC. We hold that these tenancies are founded upon contract and lease obligations subject to the disaffirmation and repudiation power of RTC, and we therefore reverse.

BACKGROUND

A. FIRREA and RTC

RTC was created by Congress in 1989 as part of a comprehensive legislative initiative to mitigate a financial crisis that had engulfed the thrift industry and the Federal Savings and Loan Insurance Corporation ("FSLIC"). H.R. Rep. No. 54(I), 101st Cong., 1st Sess. (1989), reprinted in 1989 U.S.C.C.A.N. 86, 98. The Government Accounting Office had estimated that FSLIC's operating deficit was $56 billion at the end of 1988. *Id.* at U.S.C.C.A.N. 100; see also S. Rep. No. 19, 101st Cong., 1st Sess. 2 (1989) ("Current estimates of the remaining cost to the Federal deposit insurance system of resolving the problem range from $50 billion to more than $150 billion. . . . ").

FIRREA, adopted on August 9, 1989, Pub.L. No. 101-73, 103 Stat. 364 (codified in scattered sections of 12 U.S.C.), "constituted emergency legislation" to stop the financial hemorrhaging. S.Rep. No. 19 at 3. As the House Report puts it: "The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions." H.R. Rep. No. 54(1) at U.S.C.C.A.N. 104. RTC, a "wholly-owned government corporation," was created "to manage and dispose of the assets of acquired from failed thrifts." *Id.*

RTC's primary purpose is to act as conservator or receiver for failed thrift institutions. 12 U.S.C. § 1441a(b)(3)(A) (1989 & Supp.). Congress required that

RTC conduct its operations "in a manner which [ ] maximizes the net present value return from the sale or other disposition of" thrift assets that come into its hands. 12 U.S.C. § 1441a(b)(3)(C)(i); see also S.Rep. No. 19 at 352 (Congress intended that RTC "conduct its operations so as to maximize recovery on assets it acquires, make efficient use of funds it obtains . . . and minimize losses incurred in resolving cases.").

To help RTC in carrying out this mandate, Congress armed it with the power to disaffirm or repudiate contracts or leases that RTC in its discretion determines to be burdensome. 12 U.S.C. § 1821(e)(1) (made applicable to RTC by 12 U.S.C. § 1441a(b)(4)(A)). The reach of that power is the primary issue on this appeal.

B. Rent Regulations

Owners of residential rental property in New York City have been subject to some form of rent regulation for over fifty years. Originally imposed by the federal government during World War II (Emergency Price Control Act of 1942, Jan. 30, 1942, ch. 26, Title I, § 1, 56 Stat. 23), rent controls were continued by state legislation in 1946 (Emergency Housing Rent Control Law, L. 1946, c. 274 (codified at N.Y. Unconsol. Laws §§ 8581-8597 (McKinney 1987))). Since 1962, the City of New York has enforced its own local rent regulations, which (like the federal and state measures) regulate rents and evictions in privately owned residential housing. Admin. Code of City of N.Y., §§ 26-401-415 (reported following N.Y. Unconsol. Law

§ 8617 (McKinney 1987)) ("N.Y.C. Admin.Code"). Authorized by the State Legislature, these City laws were enacted pursuant to a City Council finding

> that a serious public emergency continues to exist in the housing of a considerable number of persons in the city, which emergency was created by [World War II], the effects of war and the aftermath of hostilities . . . [and therefore] such action, as a temporary measure to be effective until . . . such emergency no longer exists . . . [requires the council to intervene] to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements. . . .

N.Y.C. Admin.Code § 26-401. This finding of emergency was renewed most recently by L.1985, c.907 (effective Sept. 1, 1986).

Currently, there are two systems of rent regulation in New York: rent control and rent stabilization. Some of the nine rent-regulated condominium units at issue are rent controlled; the others are rent stabilized.

The maximum rent for each rent-controlled property is set by an administrative board on a biennial basis. N.Y.C. Admin.Code § 26-405a(4), N.Y. Comp. Codes R. & Regs. tit. 9, § 2201.5(a) ("9 NYCRR § ___"). Upon certain enumerated contingencies, such as an increase in operating expenses, a landlord may petition the rent control board for an extraordinary increase. N.Y.C. Admin. Code § 26-405g, 9 NYCRR § 2202. So long as the tenant continues to pay the regulated rent, the landlord may not institute eviction proceedings. N.Y.C. Admin.Code § 26-408a. Rent control does not require or contemplate a current written and signed lease. In this way, the rent-

controlled tenancy survives the lease-term of the original lease instrument (and any written renewals thereof), and becomes so-called "statutory" tenancy. See, e.g., *W.T. Associates v. Huston*, 123 Misc. 2d 24, 472 N.Y.S. 2d 562, 564 (Sup. Ct. 1984).

The second program – rent stabilization – was adopted in 1969 in response to a perceived failure of rent control to adequately relieve the wartime housing emergency. N.Y.C. Admin.Code §§ 26-501-520 (McKinney 1987); see *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 313 N.Y.2d 733, 742, 261 N.E.2d 647 (1970). Unlike rent control, rent stabilization does require and contemplate a current written lease-contract, 9 NYCRR § 2522.5, and requires the landlord to offer a renewal lease to the tenant before the end of each lease term. N.Y.C. Admin.Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1). In that way, the rent-stabilized tenant, like his rent-controlled neighbor, enjoys occupancy for so long as he wishes. The City's rent guidelines board regularly fixes the maximum rent increase for one-year and two-year leases. N.Y.C. Admin.Code § 26-512, the allowable percentage increase being based in part on market conditions. N.Y.C. Admin.Code § 26-510b, 9 NYCRR §§ 2521-22. It was thought that by adopting a regulatory scheme more sensitive to market prices, and giving property owners (at that time) a choice between rent control and stabilization, new construction would flourish and the persistent housing emergency would abate. *8200 Realty Corp.*, 313 N.Y.S.2d at 742-43. However, the wartime housing emergency has been found to continue to this day, leaving most rental properties in New York subject to what the state's Court of Appeals once characterized as "an impenetrable

thicket, confusing not only to laymen but to lawyers." In *Matter of 89 Christopher, Inc. v. Joy*, 35 N.Y.2d 213, 360 N.Y.S.2d 612, 618, 318 N.E.2d 776 (1974).

C. Martin Act

Rent regulation is also implemented by certain provisions of New York's blue sky law, the Martin Act. N.Y. Gen. Bus. Law, Art. 23-A, §§ 352-359-h (McKinney 1984). Essentially an antifraud securities statute, see *Abrams v. Long Beach Oceanfront Associates Limited Partnership*, 136 Misc. 2d 137, 518 N.Y.S.2d 323, 325 (N.Y. Sup. Ct. 1987), the act regulates (inter alia) the offer and sale of securities evidencing an ownership interest in residential real property that has undergone a conversion to condominium or cooperative ownership. When the owner of an apartment building proposes such a conversion, the Martin Act mandates the inclusion of certain disclosures in the various offering documents. Among other things, the offeror is required to disclose the conditions under which eviction proceedings may be instituted against non-purchasing tenants, and the extent to which state and local rent-regulations will continue to apply to such tenancies. N.Y. Gen. Bus. Law § 352-eeee2(c).

In any conversion of a residential building to cooperative or condominium status, the offer or sale of the underlying securities in illegal unless the offering statement has been filed with the State Attorney General. N.Y. Gen. Bus. Law § 352-el(a). No offer is considered to have been officially filed without a letter from the State Attorney General to the offeror certifying that the offeror has complied with all relevant provisions of the Martin Act.

N.Y. Gen. Bus. Law § 352-e2. The Attorney General is directed to withhold the letter of certification until he finds that the offering materials comply with the Martin Act, including the disclosures concerning the treatment of non-purchasing tenants. N.Y. Gen. Bus. Law § 352eeee2.

D. The Tenancies

The individual appellees in this case are tenants in a residential building at 444 East 57th Street in New York City. Appellee Lloyd Ribner claims status as a tenant, which RTC disputes – a collateral issue we address in a separate section of this opinion. Since we reverse the order dismissing RTC's complaint against Ribner, this opinion is fully applicable to him, except to the extent we indicate otherwise.

In 1983 the building underwent a conversion to condominium ownership, pursuant to a "non-eviction" plan under the Martin Act, N.Y. Gen. Bus. Law § 352-eeee2(c). In accordance with the disclosure requirements of this statute, non-purchasing tenants, including the nine appellees in this case, were informed in the conversion plan offering documents that they could remain in their apartments, that (pursuant to this plan) they would not be evicted, and that any rent regulations governing their tenancies would continue to apply after the conversion was complete.

E. RTC's Repudiation

In or about 1984, the plan sponsor pledged these nine apartments to Nassau Federal Savings and Loan Association as collateral for a loan of $3.2 million. When the sponsor defaulted in the summer of 1987, title to the nine apartments passed to Nassau Federal S & L. Pursuant to FIRREA, the Office of Thrift Supervision ("OTS") appointed RTC receiver of Nassau Federal S & L in March 1990. RTC then reorganized Nassau Federal S & L as a new thrift institution called Nassau Savings and Loan Association, F.A. At about the same time, OTS appointed RTC conservator of this new institution. On November 16, 1990, OTS issued Resolution Number 90-2003, providing that Nassau Savings & Loan would be closed, and appointing RTC as a receiver. RTC is now responsible as receiver for disposing of the assets of this now-closed institution in a manner consistent with the requirements of FIRREA.

RTC sent the tenants two letters of repudiation, the first as conservator, the second as receiver. In the summer of 1990, RTC as a conservator determined it was suffering a net operating loss as landlord of these nine units. On the basis of that loss (which was later calculated to be approximately $18,924 per month), RTC determined that the nine tenancies were burdensome within the meaning of 12 U.S.C. § 1821(e)(1)(B), and notified each tenant in writing that RTC was repudiating the tenancy. It further advised that, pursuant to FIRREA, each tenant had the option of (a) treating the tenancy as terminated, (b)

remaining in possession for the balance of the lease-term, or (c) purchasing the unit on stated terms.[1]

The nine tenants rejected the alternative offers made by RTC, and disputed RTC's power to repudiate their tenancies. Several of them filed complaints against RTC with the New York Division of Housing and Community Renewal ("DHCR"), to which complaints RTC responded that DHCR was "without jurisdiction over the RTC and this matter." The New York Attorney General then protested by letter to RTC that it had exceeded its power in repudiating tenancies protected by New York's Martin Act and the various rent laws and regulations. In response to the concerns raised by the Attorney General, RTC adopted a policy statement assuring New York that RTC would not repudiate the leases of low-income and moderate-income tenants. See RTC Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulations (February 22, 1991) ("Statement of Policy"). In its second letter to the tenants, RTC advised that, pursuant to its Statement of Policy, no tenant of low-income or moderate-income would be subject to lease repudiation. The Statement of Policy declares that RTC will not repudiate the tenancy of any "individual whose income does not exceed 115% of the median income in the are involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size." Counsel

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[1] Ribner contends that any such correspondence was sent to his deceased mother, Muriel Ribner. As we discuss below, with respect to this individual, that contention has no material effect on this appeal.

for the New York Attorney General estimated at oral argument that the Statement of Policy would protect New York City residents with income (before family size adjustments) of up to approximately $45,000. It does not appear from the record, nor does any appellee contend, that any of the nine tenants at 444 East 57th Street are persons of low or moderate income.

F. Procedural Events

On February 25, 1991, RTC filed a complaint naming as defendants the nine individual tenants, as well as Angelo Aponte (Commissioner of DHCR), and Robert Abrams (Attorney General of the State of New York). The complaint sought a declaration that RTC has the power to repudiate the tenancies in question, and an order of eviction against Ribner, who (the complaint alleged) holds no valid interest in the tenancy of his mother's apartment. RTC sought other relief as well, which we expressly decline to address. Soon thereafter, the Attorney General and DHCR filed a complaint against RTC, alleging that RTC lacked the statutory authority to pursue its claims, and requesting declaratory and injunctive relief against RTC. These actions were subsequently consolidated.

In February 1992, the parties filed cross-motions for summary judgment: RTC requested that the district court grant it the relief prayed for in its complaint; the Attorney General and DHCR asked for a declaration that RTC lacked authority to evict "non-purchasing, rent-controlled or rent-stabilized tenants from condominium or cooperative units in buildings converted to condominium or cooperative status under a non-eviction plan filed . . .

pursuant to [the Martin Act]," and also requested a permanent injunction barring RTC from pursuing its claims. In addition, Ribner moved to dismiss RTC's complaint against him, and defendant Susan Patullo filed a motion to either dismiss RTC's complaint or, in the alternative, grant her summary judgment. (Patullo's motion apparently was never addressed below.) On August 21, 1992, after full briefing and argument, the District Court issued an opinion (a) granting New York's motion, (b) denying RTC's motion, and (c) granting Ribner's motion to dismiss the complaint against him. *Resolution Trust Corp. v. Diamond*, 801 F.Supp. 1152 (S.D.N.Y. 1992).

In its opinion, the district court framed and answered two questions: "1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and 2) if these rights derive from statutory tenancies, whether the 'any contract or lease' language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies. . . ." 801 F. Supp. at 1157. In addressing the first question, the district court examined the rent control and rent stabilization programs, as well as the Martin Act, and determined that tenants under these various schemes "enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC." 801 F. Supp. at 1159. It then held that, because the nine tenants enjoy "rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant," those rights cannot be repudiated under "the plain language" of FIRREA authorizing RTC to repudiate "any contract or lease." 801 F. Supp. at 1161.

Having held that these tenancies were not within the scope of the express language of the statute, the district court went on to address RTC's alternative argument that there is an irreconcilable conflict between the state laws and FIRREA, such that application of the state regulations would obstruct RTC's operation under FIRREA. Applying "conflict preemption" analysis, the district court concluded that insofar as the statute did not expressly include "statutory" tenancies within its scope, it could not be construed to grant RTC any power with respect to these tenancies: "since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here." 801 F. Supp. at 1164. Finally, the district court refused to grant summary judgment to either side on RTC's claim against Ribner, but did grant Ribner's motion to dismiss the complaint against him.

On appeal, RTC asserts express authorization in FIRREA allowing RTC to repudiate rent-regulated tenancies that it determines to be burdensome. RTC also argues that New York's rent regulations directly conflict with RTC's statutory mandate to maximize asset values and that, because compliance with both the state and federal laws is – with respect to these tenancies – impossible, the Supremacy Clause of the Constitution requires a finding that RTC's power to repudiate the leases of "non-needy" tenants preempts any non-federal rent regulation. We hold that these tenancies are grounded in a contract or lease and therefore fall within the express language of FIRREA and its grant to RTC of the power to repudiate "contracts or leases." Because we find that repudiation of

these tenancies is within the scope of the express statutory grant of power to RTC, we find it unnecessary to reach the issue of "conflict preemption."

Accordingly, we reverse the district court's order, and direct that judgment be entered for RTC as to its power of repudiation. With respect to Ribner, we find that, although the district court was correct in denying the cross-motions for summary judgment, RTC did state a claim upon which relief may be granted, and we therefore vacate the dismissal of RTC's complaint against Ribner and remand for further proceedings.

ANALYSIS

A. FIRREA

RTC's power to repudiate contracts and leases was conferred by Congress as a tool for maximizing net asset values. The power is described in section 11 of the Federal Deposit Insurance Act ("FDIA"):

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease –
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in [its] discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in [its] discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1). FIRREA expressly applies this provision to RTC. 12 U.S.C. § 144*a*(b)(4)(A). It is unquestionable that this provision grants RTC full discretionary powers to disaffirm or repudiate any burdensome executory contract or lease. See, e.g., *Resolution Trust Corp. v. CedarMinn Building Ltd. Partnership*, 956 F.2d 1446, 1456, (8th Cir.), cert. denied, 121 L. Ed. 2d 56, 113 S. Ct. 94 (1992). This appeal therefore turns on whether the tenancies in question are contractual in nature or whether the various rent regulations transformed these tenancies into some non-contractual, non-leasehold property interest such that they are outside the scope of the statute.

For these reasons, the definition of the phrase "contract or lease" is a matter of federal law. See, e.g., *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 557-8, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990) ("Our construction of the term 'debt' [in the Bankruptcy Code] is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself."); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431, 90 L. Ed. 2d 428, 106 S. Ct. 1931 (1986) (federal law governs meaning of "deposit" in federal statute). Although we are not bound by any state court pronouncements regarding the breadth or scope of these terms, we do consult for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue. We also, of course, continue to defer to state courts' pronouncements regarding the definition of property interests. See *Butner v. United States*, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). However, as we fully explain below, were we to find that New York law creates "statutory" tenancies not

ultimately based on a lease or other voluntary contractual arrangement, we would have to consider whether such a statutory grant of a property interest amounts to the taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Regulated Tenancies

A tenancy is an interest in the exercise of dominion over property for a fixed or computable duration. Restatement (Second) of Property § 1.4 (1977). A tenancy is initiated by a voluntary contractual arrangement between the landlord and tenant, typically memorialized in a written and signed lease. See, e.g., N.Y. Gen. Oblig. Law § 5-703 (McKinney 1989) (tenancy for period exceeding one year must be evidenced by writing, signed by party to be charged). In many states, however, it is possible to create a tenancy of short duration by oral lease agreement, without any written evidence of the terms. *Id.*; see also Restatement (Second) of Property § 2.1.

Only two terms are indispensable to the creation of a tenancy: the duration, or "term"; and the price, or "rent." In addition, lease terms typically impose other obligations on the landlord (such as the provision of various services, doormen, appliances, lighting of common areas, etc.) and on the tenant (such as maintaining the premises, avoiding excessive noise, timely reporting any needed repairs, etc.). The bundle of rights and duties will vary from tenancy to tenancy – the only common denominator being that every contract will specify rent and duration.

Although tenancy is premised on a voluntary contractual arrangement, certain obligations may be affected by operation of law. For example, regardless of any express terms to the contrary, virtually all states read a warranty of habitability into residential lease-contracts. See, e.g., N.Y. Real Prop. Law § 235-b (McKinney 1989); Restatement (Second) of Property § 5.1 (reporter's note listing states). Moreover, some states prohibit or refuse to enforce certain lease clauses. See, e.g., Conn. Gen. Stat. Ann. § 41a-4 (West 1993) (unenforceable clauses include confession of judgment and tenant's consent to distraint of personal property). While these laws change the obligations of nonconforming contracts, the voluntary and contractual nature of the relationship remains. All terms unaltered by law continue to be enforceable obligations, and each party is free to continue or discontinue the tenancy in accordance with the terms of the contract.

New York and the nine tenants contend that New York's tight net of regulation creates a statutory tenancy that is in effect non-contractual, and beyond the reach of RTC's repudiation power. We address below each of the three regulatory systems cited and relied upon by New York and the rent-regulated tenants: (1) rent stabilization; (2) rent control; and (3) The Martin Act.

1. Rent Stabilization

New York's rent stabilization laws regulate the two terms at the core of the landlord-tenant relationship: rent and duration. The regulations govern the initial rent, N.Y.C. Admin.Code § 26-512b, 9 NYCRR § 2521, restrict rent increases, N.Y.C. Admin.Code § 26-512a, 9 NYCRR

§ 2522, mandate lease renewal, N.Y.C. Admin.Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1), and, upon the tenant's vacating of the premises, allow the tenancy to pass statutorily to certain members of the tenant's household so long as that individual has lived with the tenant since the inception of the tenancy or, in the case of the death of the tenant, for at least the two years immediately preceding the tenant's demise. 9 NYCRR § 2523.5(b).

Landlord compliance with this scheme is enforced chiefly by limiting the grounds for eviction: "As long as the tenant continues to pay the rent . . . no tenant shall be denied a renewal lease or be removed from any housing accommodation" except on specified grounds. 9 NYCRR § 2524.1(a). Such grounds include the owner's desire to take possession for the owner's own use as a primary residence (§ 2524.4), and certain wrongful acts by the tenant (§ 2524.3). A landlord who fails to proffer a renewal lease will get no increase in rent until he comes into compliance with the Code. 9 NYCRR § 2522.5(b)(2). The incentive in this provision ensures that virtually all rent-stabilized tenancies will be governed by a written lease-contract.

Rent stabilization is therefore lease-based in the sense that it operates through the regulation of lease terms. The program contemplates and requires a written lease-contract as the basis of tenancy. See 9 NYCRR § 2520.12 ("The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with [the rent regulations] . . . "). While statutory provisions alter or restrict important terms of the contract, the tenancy retains much of the character of a

voluntary contract. Rent-stabilized tenancy is dependent upon a lease in these ways, and therefore is subject to RTC's repudiation power under § 1821(e).

2. Rent Control

New York's rent control statute does not contemplate or require a current written lease of the premises. Even though the original tenancies were created by written lease-contracts years (often decades) earlier, the landlord under rent control is not required to proffer a renewal lease at expiration, and the rent-control tenant is not required to sign one. So long as the tenant pays the rent, the landlord may not evict: "No tenant, so long as he or she continues to pay the rent . . . shall be removed from any housing accommodation which is subject to rent control . . . notwithstanding the fact that the tenant has no lease or that his or her lease . . . has expired or otherwise terminated. . . . " N.Y.C. Admin.Code § 26-408a. The district court concluded therefore that the rent-controlled tenancy is something distinct from a property interest under a lease or contract. We disagree.

The rent-controlled tenancy bears many of the hallmarks of a contractual relationship. Indeed, it is difficult to see any other lawful basis for the landlord-tenant relationship. Under rent control, the landlord and tenant owe mutual obligations: the tenant is obligated to pay rent, and the landlord is obligated to provide a bundle of rights and services. The regulations provide that a landlord may not reduce the level of services that were provided to the tenant under the initial tenancy-creating

contract. 9 NYCRR § 2201.2 ("Every landlord shall furnish with housing accommodations the same dwelling space and the same essential services, furniture, furnishings and equipment as were furnished, or required to be furnished, on April 20, 1962 or any subsequent date determining the maximum rent."). The kind, level and schedule of services that the landlord owes the rent-control tenant is therefore determined by reference to the original lease-control creating the tenancy. See 9 NYCRR § 2200.13 ("The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with the Rent Law or these regulations."). Taken together, these two provisions enforce many of the original contractual elements of the tenancy. This being so, the landlord-tenant relationship is defined and governed by contract, rent control notwithstanding.

The courts of New York recognize that the terms of the last written lease continue to remain in effect under rent control. In *Barrow Realty Corp. v. Village Brewery Restaurant, Inc.*, 272 A.D. 262, 70 N.Y.S.2d 545, 546 (App.Div. 1947), New York's intermediate appellate court considered whether or not a provision of the original lease (providing that the tenant shall pay the landlord's attorney fees in a proceeding brought because of tenant's default) survived the lease expiration, and concluded that "the clause . . . is carried over, as are other provisions of the lease, to the tenant's occupancy during the period in which he remains in possession under the emergency rent law after the expiration of the term of the lease." The absence of any current written lease notwithstanding, the court held:

> Default in the payment of the emergency rent is not merely a statutory default; it is a default under the lease. . . . The continued occupancy permitted by the statute stems from the lease and the tenancy created thereby, and the emergency rent is fixed on the basis of the rental established in the lease. With the terms of the lease otherwise remaining in force, it may not fairly be said that the rent payable during the emergency period is merely a statutory rent and is not under the lease.

Id., see also *Hudson View Properties v. Weiss*, 109 Misc. 2d 589, 442 N.Y.S.2d 367, 370 (App.Term 1981) ("In the case of a statutory tenancy . . . 'with the exceptions of the duration of the term, and the amount of rent payable, the rule established by the weight of authority is that insofar as the provisions of a lease which has expired are not in conflict with the then prevailing emergency rent statutes, and are not confined to the period of the expired lease, they are projected into the statutory tenancy, and will continue in effect during the term of the statutory tenancy.' " (quoting Rasch, New York Landlord and Tenant, 2d Ed., § 286)), rev'd, 86 A.D.2d 803, 448 N.Y.S.2d 649 (App.Div. 1982), rev'd, 59 N.Y.2d 733, 463 N.Y.S.2d 428, 450 N.E.2d 234 (1983); *130 West 57 Corp. v. Hyman*, 188 Misc. 92, 66 N.Y.S.2d 332, 334 (App.Term 1946) ("The housing emergency calls for such stringent measures but it would be carrying the protection afforded a tenant to an unfair degree to hold that the obligations of the tenancy incorporated in the lease do not govern the relationship of landlord and tenant. . . . The rights and obligations of the parties under the lease are projected

into and become part of the statutory tenancy, except where they are plainly inconsistent with the Act.").[2]

Rent control, like rent stabilization, affects the lease by statutorily altering and specifying certain terms, chiefly by granting the tenant a statutory renewal option. That option to renew is exercised, at least tacitly, when the tenant continues in occupancy after receiving notice of the biennial rent adjustment made pursuant to the statute and regulations, N.Y.C. Admin.Code § 26-405a(4), 9 NYCRR § 2201.5, thereby agreeing to pay the new rent during the next two years. But rent control does not obliterate the lease.

Even were we to agree with New York that a rent-controlled tenancy is independent of any lease (which we do not), we would still hold that it is sufficiently rooted in contract to fall within the express language of FIRREA. While these tenancies are tightly regulated and policed, such a regime does not eliminate the contractual nature of the relationship, any more than do the regulatory

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[2] See also *65 Central Park West, Inc. v. Greenwald*, 127 Misc. 2d 547, 486 N.Y.S.2d 668, 672 (N.Y. City Civ.Ct. 1985) ("The fact that the original lease has expired is irrelevant because the terms and conditions of that lease are said to continue in the context of the rent controlled statutory tenancy." (citation omitted)); *Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455, 460-61 (N.Y. City Mun.Ct. 1950) ("The conventional relationships of landlord and tenant, with privity of contract and privity of estate, existed . . . prior to the expiration of the lease. That under the Emergency Housing Laws, the provisions of a lease, except for the term and the rent reserved are projected into and become a part of the statutory tenancy is now beyond question." (citations omitted)).

schemes governing the provision of such services as electric power, natural gas, medallion taxi rides, or cable television. Some contracts are more heavily regulated than others, but they are not thereby transformed into something non-contractual or super-contractual.

The voluntary and contractual aspects of the rent-control arrangement distinguish it from the kind of housing measure invalidated by the New York Court of Appeals as an unconstitutional taking in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, cert. denied, 493 U.S. 976, 107 L. Ed. 2d 503, 110 S. Ct. 500 (1989). There, the Court of Appeals struck down a local ordinance requiring owners of properties used as single-room occupancy housing ("SRO's") to rehabilitate their buildings for use as SROs indefinitely, and contrasted that ordinance with rent regulations such as those at issue in this case: "the rent-control and other landlord-tenant regulations that have been upheld . . . merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing." 544 N.Y.S.2d at 548. The SRO ordinance was found to be a per se taking because its coercive design eliminated the voluntary and contractual nature of the landlord-tenant relationship, and " 'interferes so drastically' . . . with the SRO property owners' fundamental rights to possess and to exclude." 544 N.Y.S.2d at 548 (quoting *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 836, 97 L. Ed.2d 677, 107 S. Ct. 3141 (1987), and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982)).

We conclude, therefore, that New York's statutory tenancies – whether under rent stabilization or rent control – are contract-based leaseholds. That being the case, they fall within the express language of § 1821(e), and are subject to RTC's statutory power to repudiate. By repudiating the contract or lease creating the tenancy, RTC is effectively dissolving the tenancy. Once it has done so, no statutory or regulatory provision – at least none that can pass constitutional muster – can revive that tenancy.

3. The Martin Act

The Martin Act, New York's blue sky law, alters our analysis not at all. "No private action has been expressly authorized" in the Martin Act. *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 807, 514 N.E.2d 116 (1987). "The specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices. . . . " *Id.* Most enforcement of the Martin Act is in the hands of the Attorney General, usually by means of a fraud action.

The Martin Act requires the offeror to reassure tenants in the offering documents that their rights under rent regulation will survive if they do not buy their apartments. The Act does not add to those rights in any way, however. The attorney General enforces the offeror's obligation by his power to control the sale of securities. Thus the Martin Act forbids the sale of the cooperative or condominium shares unless the offering documents have been certified for filing by the Attorney General (and filed), and prohibits the Attorney General from certifying

the offering documents for filing unless they contain the requisite disclosures and assurances. N.Y. Gen. Bus. Law. § 352-eeee2.

The Martin Act thus does no more than require that certain statements be included in the offering documents. It creates no private affirmative right and no private right of action. *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Associates*, 191 A.D.2d 621, 595 N.Y.S.2d 492, 494 (App.Div. 1993) ("It is now well settled that there is no private cause of action under the Martin Act.") (citing *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987); *Vermeer Owners v. Guterman*, 78 N.Y.2d 1114, 578 N.Y.S.2d 128, 585 N.E.2d 377 (1991); *Board of Managers of Fairways at North Hills Condominium v. Fairways at North Hills*, 150 A.D.2d 32, 545 N.Y.S.2d 343 (App. Div. 1989)). Non-purchasing tenants of a condominium subject to a Martin Act conversion plan hold their tenancies by contract (however that contract may have been shaped and extended by legislation), and these tenancies are therefore subject to repudiation by the RTC.

C. Congressional Intent

If it chooses, Congress can grant disaffirmation or repudiation power in a way that preserves state regulated leases and contracts. For example, under the Bankruptcy Code a trustee in bankruptcy is granted power to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). In *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986), the court held that a debtor-lessor could not use that provision to repudiate leases that were subject to New York's rent

control laws. New York's brief on the present appeal, and the opinion of the district court, rely heavily on Friarton. However, as Bankruptcy Judge Prudence Abram noted in *Friarton*, the Bankruptcy Code includes an express provision allowing the tenant to effect "any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law." 65 B.R. at 593 (quoting 11 U.S.C. § 365(h)(1)). *Friarton* bars the debtor from exercising the power to repudiate leases that are rent-controlled or rent-stabilized, because the tenant's right to renew and extend the tenancy is conferred by "applicable nonbankruptcy law."

The express deference to "applicable nonbankruptcy law" in the Bankruptcy Code which saves from repudiation lease renewal rights enforceable under rent control, has no counterpart in FIRREA or FDIA. The bankruptcy provision has been in the Code since its inception in 1978. Pub.L. No. 95-598, 92 Stat. 2574 (1978). When Congress enacted FIRREA in 1989, Congress borrowed and adopted many of the provisions of the Bankruptcy Code dealing with a lessee's rights when the debtor-lessor rejects a lease contract. See S.Rep. No. 19 at 314 (12 U.S.C. § 1821(e) was "closely modeled on parallel provisions of section 365 of the Bankruptcy Code."). It is telling that the only relevant feature that Congress omitted from 12 U.S.C. § 1821(e)(5) was the one that grants the lessee a right to exercise his renewal or extension options under "applicable nonbankruptcy law." [3] This alone strongly

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[3] Compare 11 U.S.C. § 365(h)(1) ("If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor . . . the lessee . . . may treat such . . . as

signifies Congressional intent to grant RTC greater powers in this respect than those given to a bankrupt debtor. See *Wheeler v. Greene*, 280 U.S. 49, 51, 74 L. Ed. 160, 50 S. Ct. 21 (1929) "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed.").

The textual distinction between FIRREA/FDIA and the Bankruptcy Code is reinforced by functional considerations. Without the deference to "applicable non-bankruptcy law" in the Code, prospective bankrupts could achieve solvency by acquiring rent-regulated properties before filing under Chapter 11 so that the rent-regulated leases could be alchemized by repudiation. Thus the Code's bar on the repudiation of rent-regulated leases prevents the use of the bankruptcy process as a device for emptying rent-controlled properties.

These same concerns do not arise in the FIRREA context. RTC does not acquire properties for speculation

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terminated by such rejection . . . or, in the alternative, the lessee . . . may remain in possession of the leasehold . . . for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law.") with 12 U.S.C. § 1821(e)(5)(A) ("If the conservator or receiver repudiates an unexpired written lease of real property . . . the lessee under such lease may either – (i) treat the lease as terminated by such repudiation; or (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.").

and is not actively seeking to acquire rent-regulated properties in order to repudiate leases. Under its statutory mandate, RTC simply disposes of properties that come into its hands from failed financial institutions. Absent any likelihood of predatory behavior by RTC as receiver or conservator, there was no reason for Congress to restrict the kinds of tenancies subject to its repudiation powers, and every reason for Congress to strengthen RTC's hand in remedying a national economic emergency.

D. Post-Repudiation Occupancy Rights

Once RTC repudiates a lease, a tenant may choose to "remain in possession of the leasehold interest for the balance of the term of the lease. . . . " 12 U.S.C. § 1821 (e)(5)(A)(ii). New York and the tenants argue that, even if a statutory tenancy is a leasehold, New York law makes the leasehold perpetual, and that RTC therefore is not entitled to evict them even if RTC has power to repudiate the leases. If the leasehold were truly perpetual, this argument would mandate affirmance of the result reached by the district court.

How long is "the balance of the term of the lease" when the RTC repudiates a rent-regulated New York tenancy? Since tenancies under the rent stabilization law are expressly lease-based, § 1821(e)(5)(A)(ii) allows the tenant to continue the tenancy on existing terms until the end of the lease term during which the notice of repudiation is given.

Rent-controlled tenancies, however, do not run for any specified term. There are two conceivable arguments for the idea that the term is perpetual: first, by analogy to

perpetual written leases under New York law; second, by reference to the potentially lifelong and inheritable nature of rent-controlled occupancy.

Under New York law, a perpetual lease can be created by the grant of a fee interest in property coupled with the grantor's reservation of a right to collect rent forever. See *First Religious Society in Whitestown v. Socony Mobil Oil Co.*, 44 Misc. 2d 415, 253 N.Y.S.2d 839, 842 (Sup. Ct. 1964) (grant of fee interest in property, where grantor reserves right to collect rent in perpetuity, landlord-tenant relationship under a perpetual lease). Such an arrangement, however, is disfavored by the law and can come into being only if the lease itself clearly provides for perpetual tenancy. See *Garner v. Gerrish*, 63 N.Y.2d 575, 483 N.Y.2d 973, 975, 473 N.E.2d 223 (1984). In the absence of an express lease duration or an express term of perpetuity, New York law assigns a lease term, usually a short one. See N.Y. Real Prop. Law § 232 (McKinney 1989) (where parties fail to specify, lease of New York City property ends October 1, following possession); see also Restatement (Second) of Property § 1.5, and Comment (d) to that section ("Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy is presumed. The period thus presumed is equal to the interval for which rent is reserved or paid to a maximum periodic tenancy of year to year."); N.Y. Real Prop. Law §§ 232-a (notice to terminate month to month tenancy in New York City), 232-c (holding over tenant after expiration of term; effect of landlord's acceptance of rent); *28 Mott Street Co. v. Summit Import Co.*, 34 A.D.2d 144, 310 N.Y.S.2d 93 (App. Div. 1970) (occupancy

of premises for six years, bimonthly payments and unexecuted ten year lease, together created year to year tenancy), aff'd, 28 N.Y.2d 508, 319 N.Y.S.2d 65, 267 N.E.2d 880 (1971).

New York contends that a rent-controlled lease term ends when the right of occupancy ends, which would allow a repudiated lease to run under § 1821(e)(5)(A)(ii) for the lives of the tenant, the tenant's spouse or life companion, and of their issue. However, the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be construed fairly to accommodate so prolonged a residual tenancy. In any event, we cannot use these statutory occupancy rights to delimit the leasehold for FIRREA purposes because the statutory tenancy is by definition limited to the life of the statute, and therefore cannot outlive the declared end of the wartime housing emergency that the statute purports to remediate. Moreover, the temporary nature of the rent control laws is needed to insulate them from constitutional challenge. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982) ("This Court has consistently affirmed that States have broad power to regulate . . . the landlord-tenant relationship. . . . In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." (citations omitted)); *Block v. Hirsh*, 256 U.S. 135, 157, 65 L. Ed. 2d 865, 41 S. Ct. 458 (1921) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

Rent-controlled tenancy under New York law is therefore neither perpetual nor measured by the life of

the tenant (and the tenant's successors). New York law provides two intervals that can be used to fix the term of a rent-controlled tenancy. Under N.Y. Real Prop. Law § 232, a lease agreement for real property in New York City that fails to specify a duration is deemed to end on the October 1 next following the date that the tenant occupies the premises. That rule, however, is evidently designed to supply a missing term in an unregulated contract. Since a specific body of New York law regulates rent-controlled tenancies, and since that body of law extended the tenancy, we first consider whether that body of law divides the tenancy into periods analogous to lease terms. Since it does, we look no further. Under rent control the lease term ends, for purposes of § 1821(e), on the biennial January 1 date on which the landlord next becomes entitled (following the notice of repudiation) to a review of the maximum base rent. See N.Y.C. Admin. Code § 26-405a(4)). Therefore, the term of a rent controlled tenancy is two years, commencing on the January 1 of the last biennial review set by the statute prior to notice of repudiation.

E. Other Arguments

New York argues that, even if RTC has the power to repudiate these tenancies, RTC has violated its statutory mandate in repudiating the nine tenancies at issue on this appeal. First, New York contends that there was no proper basis for RTC's determination that these leases are "burdensome". RTC, as conservator or receiver, may repudiate contracts or leases "the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome." 12

U.S.C. § 1821(e)(1)(B). New York contends that "burdensomeness" must be evaluated in terms of RTC's statutory mandate to "maximize the net present value return" on asset disposition. Underlining the word "present," New York argues that "Congress instructed RTC to focus" on the asset's "current value, not its value at some future date," and that the "current value" of the nine condominium apartments is their value under rent control and rent stabilization.

We are unpersuaded. The "current" value of any rented property is of course affected by a leasehold interest; but that happens regardless of whether the leasehold is "statutory." The point is that Congress has expressly conferred a power of repudiation that allows RTC to realize "current" value of property free of such leaseholds. Moreover, Congress instructed RTC to exercise its discretion in determining which contracts or leases are burdensome, pursuant to an overarching mandate to "maximize the net present value return" on assets in its possession. It is uncontroverted that (a) these tenancies are causing RTC to lose close to $19,000 per month and (b) these occupied rent-regulated units are worth millions of dollars less than they are worth vacant or free of rent regulations. It cannot be said therefore that RTC abused its discretion in finding these tenancies burdensome.

Next, New York argues that "if FTC prevails in this case, it will be empowered to proceed to repudiate [other] statutory tenancies" and that this "will have a farreaching effect" on New York's housing market. This, according to New York, violates FTC's obligation to consider the

adverse impact of its actions on local communities" inasmuch as "thousands of long-term tenants [will be] suddenly evicted from their homes."

New York points to RTC's obligation to minimize the impact of its asset dispositions on "local real estate and financial markets." 12 U.S.C. § 1441a(b)(3)(C)(ii). As to these nine tenancies – the only ones at issue at this time – even the simultaneous sale of all nine would have no more than a de minimis effect on the market. As to all others, we simply lack sufficient information to tell.[4] For example, we do not know how many of these units have below-market rents, how many might be occupied by tenants whose income renders the tenancy ineligible for repudiation under RTC's Statement of Policy, how many tenancies RTC will exercise its statutory discretion to repudiate, which ones out of that number will be purchased by the current tenants, over what time the remaining units would come on the market, whether RTC would spread unit sales over time to advance its own interest in maintaining a firm market, and how RTC might otherwise exercise its discretion (conferred by Congress) to avoid adversely impacting the market. Until RTC exercises is discretion to actually repudiate an appreciable number of additional tenancies, a court is not in a position to consider whether or not RTC's conduct falls

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[4] According to RTC, however, it currently holds approximately 274 rent-regulated cooperative or condominium units, which represents approximately .015% of the 1,884,000 residential rental units in New York City. Accepting arguendo New York's contention that this number could be closer to 1,000, this would still only amount to .053% of the rental market.

within the rather nebulous statutory parameters, or even who (if anyone) would have standing to raise the issue.[5]

Finally, New York urges that any repudiation of these "statutory" tenancies will constitute a taking without just compensation in violation of the Fifth Amendment to the Constitution. This argument fails for at least two reasons. First, New York assumes there is a property interest here warranting compensation if "taken." However, any property interest in a temporary estate, by definition, can extend only to the end of the term of that estate. We have already decided that each tenant has the option of remaining in possession through the end of the tenancy's term: so nothing is being "taken." Second, New York in its brief identifies the thing taken as "leasehold interests." But § 1821(e) expressly authorizes the repudiation of leases, and in several places refers to the repudiation of a tenant's "leasehold interest." See 12 U.S.C. §§ 1821(e)(5)(A)(ii) and (B). The state's regulatory overlay certainly makes these tenancies more advantageous, but that simply reinforces RTC's finding that they are burdensome.

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[5] New York expresses concern for the "far reaching effects on the tenants." However, any impact on tenants will be mitigated by RTC's express policy not to exercise its repudiation power with respect to families of low and moderate income. Under the current Statement of Policy (and pursuant to 12 U.S.C. § 1441a(b)(3)(C)(v)), the only rent-regulated tenants who would be exposed to possible repudiation of their tenancies are those with income (according to the figure proffered by New York at oral argument) in excess of $45,000 per year.

F. Conflict Preemption

Having held that § 1821(e) expressly authorizes RTC to repudiate the tenancies at isuse, we have no occasion to reach or address "conflict" preemption, a provocative issue thoroughly considered by the district court. 801 F. Supp. at 1162-64. We note, however, that the Resolution Trust Corporation Completion Act, Pub.L. No. 103-204, 107 Stat. 2369 (1993), signed into law three days before the oral argument of this appeal, contains the following provision under the heading "RTC Management Reforms" (and the subheading "contracting procedures"): "nothing in this Act, or any other provision of law, shall supersede the [RTC's] primary duty of minimizing costs to the taxpayer and maximizing the total return to the Government." 12 U.S.C. § 1441a(w)(19)(B). Inasmuch as the affirmation or disaffirmation of a contract is arguably a "contracting procedure," this could be read to accomplish the preemption of state rent regulations, to the extent they interfere with RTC's mandate. We are not required to reach this issue, however.

G. Ribner's Claim to Tenancy

Lloyd Ribner alleges that he holds his tenancy by succession from his mother, Muriel Ribner. For this succession to be valid under New York's rent regulations, he must have resided in his mother's apartment at least for two years immediately prior to her death. 9 NYCRR § 2204.6(d)(1). In support of its motion for summary judgment, RTC presented evidence that Ribner had moved into the apartment only several weeks before his mother's death, and that within several days of her

demise he had once again vacated the premises. Ribner provided rebuttal evidence in the form of an affidavit stating that he "resided with her contemporaneously for several years prior to her death. . . . " on this basis, the District Court found there to be a disputed material fact in issue, and denied both parties' motions for summary judgment.

When a moving party has supported his motion with an affidavit, Rule 56(e), Fed.R.Civ.P. requires that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." We cannot say that Ribner failed to satisfy this requirement. That depends on whether, given the artful phrasing of his affidavit, his having "resided with [his mother] contemporaneously" means (as it is calculated to suggest) that he resided with her continuously for the period of "several years"; that "several" means two or more; and that "prior" means immediately prior. Nothing less or different would satisfy the minimum statutory requirement. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (to successfully oppose motion for summary judgment, non-moving party must demonstrate more than "some metaphysical doubt as to the material facts, . . . [it] must come forward with 'specific facts showing that there is a genuine issue for trial.' ") (quoting Fed. R. Civ. P. 56 (e)). Notwithstanding these possible ambiguities, we conclude that the district court correctly denied both parties' motions for summary judgment on this issue.

The district court also dismissed the complaint against Ribner, because it could find "no indication that

[thirty days' notice of intent to regain possession, required by New York rent control law] was ever served upon Ribner." 801 F. Supp. at 1164. This conclusion is wholly inconsistent with Ribner's admission (through his incorporation by reference of portions of the affidavit filed by another tenant) that he received a letter on August 17, 1990 indicating RTC's intent to repudiate the tenancy. That letter was received a full six months prior to the filing of RTC's complaint, and thus fully satisfies any thirty-day notification requirement. We therefore vacate the District Court's dismissal of RTC's complaint.

CONCLUSION

Title 12 U.S.C. § 1821(e) expressly authorizes RTC to "disaffirm or repudiate" tenancies subject to New York's rent stabilization and rent control laws – these tenancies being based in contract or lease. We therefore reverse the District Court's order, and direct it to enter summary judgment for RTC on the issue of RTC's power to repudiate these tenancies. As to defendant-appellee Lloyd Ribner, we affirm the district court's refusal to grant summary judgment, and vacate the district court's order dismissing the complaint. We also remand for further proceedings not inconsistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Nos. 91 Civ. 1361 (RLC), 91 Civ. 1683 (RLC)

RESOLUTION TRUST CORPORATION, as receiver of Nassau Savings and Loan Association, F.A.,
Plaintiff,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of Muriel Ribner, deceased, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER, ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants.

ROBERT ABRAMS, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Plaintiffs,

v.

RESOLUTION TRUST CORPORATION, NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., JEROME MARON, and ANTHONY T.S. CONRAD,
Defendants.

Aug. 21, 1992

ROBERT L. CARTER, District Judge.

At issue in these consolidated actions is whether the Resolution Trust Corporation ("RTC") is empowered by federal statute to evict tenants in RTC-controlled apartments in violation of state rent control, rent stabilization, and securities laws. The RTC contends that its enabling statute contains such authorization, and that contrary state laws are preempted under the Supremacy Clause of the United States Constitution. The Attorney General of the State of New York and the New York State Division of Housing and Community Renewal ("DHCR") (collectively the "State") argue that the RTC has no such power, and that state laws regulating rent and evictions are not preempted and must be obeyed by the RTC. Both the RTC and the State have moved separately for summary judgment.

The first of the consolidated cases is a declaratory judgment action, No. 91 Civ. 1361 (RLC), brought by the RTC as receiver of Nassau Savings and Loan Association, F.A. ("Nassau Savings"), against Angelo Aponte, the Commissioner of DHCR; Robert Abrams, the Attorney General of the State of New York; and the individual lessees of nine condominium units located at 444 East 57th Street, New York, New York (the "East 57th Street units") that the RTC acquired as a result of the failure of Nassau Federal Savings and Loan Association ("Nassau Federal"). The RTC has sought to evict rent-regulated tenants in the East 57th Street units and has adopted a policy statement which sets out its intention to take

similar action against rent-regulated tenants in all other cooperative and condominium units under its control.[1]

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[1] The RTC adopted a "Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulation" (the "policy statement") in February, 1991. The policy statement declares, in relevant part:

> 1. The policy of the RTC will be to exercise its disaffirmance or repudiation powers with regards [*sic*] to these units when it determines that: 1) the insured depository intention is a party to the lease; 2) the performance of which the conservator or receiver determines, in its discretion, to be burdensome; and 3) . . . the disaffirmance or repudiation of which the conservator or receiver determines, in its discretion, will promote the orderly administration of the institution's affairs.
>
> 2. Where the RTC finds that units are leased by low or moderate income tenants, the RTC will not exercise its disaffirmance or repudiation powers with respect to those units. For this purpose, a low or moderate income tenant is defined as a family or individual whose income does not exceed one hundred and fifteen percent (115%) of the median income in the area involved. . . .
>
> 3. Where the RTC determines to disaffirm or repudiate the leases of such units, the RTC may, in its discretion, offer the units for sale to the existing tenants or negotiate other arrangements, on terms which the RTC finds acceptable, in accordance with its mandate to maximize recoveries on the assets of the institutions in its control. If the existing tenants decline or fail to purchase the units or to enter into any other agreement acceptable to the RTC, the RTC will be free to consummate the disaffirmance or repudiation and to take whatever action it deems appropriate for the disposition of the units.

Complaint, No. 91, Civ. 1361 (RLC), Exhibit D.

In this action the RTC, which was established by Congress for the purposes of managing and disposing of the assets of failed savings and loan institutions, seeks to establish that it has the right under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183; 12 U.S.C. § 1441a(b), to disaffirm and repudiate condominium and cooperative unit leases; that this authority under FIRREA preempts any state law or regulation to the contrary; and that the RTC may therefore sell the East 57th Street units pursuant only to FIRREA provisions and without restraint of any law or regulation of New York State or New York City.

In the second of the consolidated actions, No. 91 Civ. 1683 (RLC), the State challenges the RTC's authority to disregard New York State's comprehensive statutory scheme regulating the offer and sale of cooperative and condominium apartments and the rights of rental tenants. The State seeks declaratory and injunctive relief enjoining the RTC from taking any action in violation of the state rent and securities laws.

I.

The RTC finds its power to repudiate the leases of tenants of rent-regulated housing in 12 U.S.C. § 1821(e)(1), a part of FIRREA, which reads as follows:

> (e) Provisions relating to contracts entered into before appointment of conservator or receiver.
>
> (1) Authority to repudiate contracts.
>
> In addition to any other rights a conservator or receiver may have, the conservator or

> receiver for any insured depository institution may *disaffirm or repudiate any contract or lease* –
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (emphasis added). The RTC argues that state rent and securities laws that regulate allowable rents and provide tenants with protection from eviction frustrate the accomplishment of the RTC's mandate under FIRREA to maximize the net present value of the assets of failed thrift institutions. The RTC therefore asserts that it may, pursuant to its discretionary powers under section 1821(e)(1), repudiate and disaffirm the leases of tenants in rent-regulated housing under its control in New York State, and thereby exercise control over the apartments free from the constraints of the state rent and securities laws.

The State responds that FIRREA does not give the RTC the power to disregard the requirements of state rent and securities laws. The State argues that the occupancy rights of tenants in New York's rent-regulated housing do not stem from leases or contracts, but instead from statutory tenancies created by the state rent control and rent stabilization laws. The State contends that section

1821(e)(1) gives the RTC power to repudiate or disaffirm contracts and leases but not statutory tenancies, and that the RTC therefore does not have the power to evict the East 57th Street tenants, or any other tenants of rent-regulated housing under RTC control in New York State.

The RTC replies to the State's argument by asserting that FIRREA has preempted whatever rights tenants in rent-regulated housing may have under New York statutory law, thereby leaving only a lease relationship between the tenants and the RTC as landlord. The RTC would then be free to repudiate the leases under section 1821(e)(1). The issue of whether the state rent and securities laws are preempted by FIRREA is complicated, however, and will require extensive discussion.

Under the Supremacy Clause of the United States Constitution, laws passed by Congress become the law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. IV, Cl. 2. However, "[p]reemption of state law by federal statute is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)). This presumption against preemption applies especially where the state law said to be preempted is within the traditional police powers of the states. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir.

1991). In such cases, the party arguing for preemption carries a heavy burden of showing that preemption was the "clear and manifest purpose of Congress." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("compelling evidence" of an intent to preempt must be shown where the area is traditionally regulated by the states).

The state laws that the RTC claims are preempted by FIRREA deal with rent and real estate securities regulation, which are areas within the traditional police powers of the states. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985). Accordingly, there is a presumption against preemption of the state laws by FIRREA.[2]

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[2] The RTC argues that the presumption against preemption only arises where the *federal* legislation regulates areas traditionally within the police powers of the states, not where the state laws allegedly preempted do so. The RTC asserts that FIRREA, as a federal banking statute designed to solve a crisis among savings and loan institutions, is not a federal statute that involves the traditional police powers of the states, and that therefore no presumption against preemption should apply here.

This argument misses the mark. First, the cases make clear that a presumption against preemption arises not only when federal legislation involves areas historically reserved to the states, but also when the state statutes sought to be preempted do as well. *See Rogers, supra*, 948 F.2d at 859; *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1160-61 (S.D.N.Y.1991) (Haight, J.).

Second, the rationale behind having such a presumption in the first place applies whether the federal or the state laws involve the traditional police powers of the states. The doctrine

Federal statutes can preempt state laws in three ways: expressly, through implication, or where there is a conflict between the state and federal laws. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987). Express preemption is found where the federal legislation contains an express statement of a clear and manifest intent to preempt state laws. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Implied preemption occurs where there is a clear indication that Congress intended to occupy the entire regulatory field. *Guerra, supra*, 479 U.S. at 280-81, 107 S.Ct. at 689. The third type of federal displacement of state law, "conflict preemption," occurs either where there is a conflict between the federal and state laws which makes compliance with both laws physically impossible, or where there is a conflict in which application of the state law will create an obstacle to the accomplishment of the full objectives of Congress. *California v. ARC America Corp.*, 490 U.S. 93, 100-101, 109 S.Ct. 1661, 1664-1665, 104 L.Ed.2d 86 (1989); *Silkwood v. Kerr-*

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is designed to ensure that the traditional police powers of the states not be lightly superseded by federal laws. *See California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Given this rationale, it matters little whether the federal legislation addresses areas of traditional state concern directly, or whether the state laws that the federal legislation is claimed to preempt address such state police powers. In either case, concern for protecting against unintentional federal displacement of state laws justifies a presumption against preemption by federal law.

McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1161 (S.D.N.Y.1991) (Haight, J.). The RTC contends that the state rent and securities laws are preempted on the basis of express provisions of FIRREA and because of a conflict between the state laws and FIRREA.

II. *Express Preemption*

The RTC argues first that FIRREA expressly preempts the state rent and securities regulations. The RTC relies on 12 U.S.C. § 1821(c)(2)(C), which reads: "When acting as conservator or receiver . . . the [RTC] shall not be subject to the direction or supervision of any . . . State in the exercise of the [RTC]'s rights, powers and privileges." The RTC asserts that the state rent and securities laws subject the RTC to the direction of the state in the exercise of the RTC's rights, powers and privileges, and that the state provisions are therefore expressly preempted by section 1821(c)(2)(C). However, the State challenges the RTC's apparent assumption that its "rights, powers and privileges" include the power to repudiate a statutory tenancy. If, as the State argues, the tenants in the East 57th Street units occupy their apartments by virtue of statutory tenancies rather than leases, and if the RTC does not have the power under section 1821(e)(1) to repudiate such statutory tenancies, then the RTC's "rights, powers and privileges" do not include the power to repudiate the tenancies, and there can be no express preemption under section 1821(c)(2)(C).

Accordingly, determination of whether the state rent and securities laws are expressly preempted by FIRREA requires the court to address two separate questions: 1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and, 2) if these rights derive from statutory tenancies, whether the "any contract or lease" language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies as well as the more traditional landlord-tenant relationship embodied in a lease.

A. *Occupancy Rights of Rent-Regulated or Non-Purchasing Cooperative and Condominium Tenants*

The State claims that the East 57th Street tenants, and others in their situation, are in continued possession of their apartments not by virtue of any leases entered into between themselves and their landlords, but because of statutory tenancies created by at least one of three statutes: New York's rent control law, its rent stabilization law, or a section of its general business law commonly referred to as the "Martin Act."

New York law provides two systems of protection for certain rental properties: rent control and rent stabilization. Both systems regulate allowable rents and protect tenants from eviction except under specified circumstances. Section 26-408 of New York's rent control law provides:

> No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this

> chapter by action to evict or recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto, . . .

except on certain specified grounds, e.g. that the tenant is violating a substantial obligation of the tenancy, or where the landlord has obtained a certificate of eviction from the supervising government agency. N.Y. City Admin.Code § 26-408 a, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987). The language of the statute itself makes clear that the tenants it covers enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant.

New York case law supports this interpretation. As the court noted in *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr.S.D.N.Y.1986), "[u]nder New York law, the occupancy of a statutory tenant is 'not under any agreement, express or implied, but by virtue of the compulsion exerted on the landlord by the local emergency rent laws which allowed him to remain in possession.' " *Id.* at 592 (quoting *Whitmarsh v. Farnell*, 298 N.Y. 336, 343, 83 N.E.2d 543 (1949). Similarly, when called upon to determine whether rent-controlled tenants held their apartments by lease or by statutory tenancy, the court in *W.T. Associates v. Huston*, 123 Misc.2d 24, 26, 472 N.Y.S.2d 562, 564 (Sup.Ct.N.Y.Cty.1984), held that rent controlled tenants

"are statutory tenants . . . [who] do not hold leases. . . . " Thus, the tenants in the East 57th Street units, as well as all other tenants in rent-controlled housing now under the control of the RTC, enjoy occupancy rights under New York law that are independent of any lease or contractual relationship with their landlords.

New York's rent stabilization laws are structured somewhat differently, but the result is the same. The rent stabilization law requires owners to grant a renewal lease of one or two years to all rent-stabilized tenants. *See* N.Y. City Admin.Code § 26-511, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y. Comp. Codes R. & Regs. tit. 9, part 2522.5 (1990). However, while rent-stabilized tenants, unlike rent-controlled tenants, do hold leases, they also enjoy statutory rights that are independent of any lease. If a landlord refuses to offer a tenant a renewal lease, the tenant has the right under statutory law to remain in possession and continue paying the previously authorized rent. The leases merely provide a means for periodically increasing the rents landlords are allowed to charge. *See Park Summit Realty Corp. v. Frank*, 107 Misc.2d 318, 323, 434 N.Y.S.2d 73, 76-77 (App. T. 1st Dep't 1980), *aff'd*, 84 A.D.2d 700, 448 N.Y.S.2d 414 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1025, 453 N.Y.S.2d 643, 439 N.E.2d 358 (1982) (applying *Whitmarsh v. Farnell, supra*, 298 N.Y. at 343, 83 N.E.2d 543, reasoning to rent stabilization as well as rent control context); Affidavit of Angelo Aponte, Commissioner of DHCR, Jan. 9, 1992, ¶¶ 12-16. Accordingly, even if RTC repudiated the leases of rent-stabilized tenants in the condominium or cooperative units it controls, those tenants would still enjoy statutory

rights to remain in possession of their apartments indefinitely and without a rent increase. Aponte Affidavit, ¶ 14.

The third law that the State contends gives a statutory tenancy to the tenants at the East 57th Street units, as well as to other non-purchasing tenants in cooperative and condominium units controlled by the RTC, is the Martin Act, N.Y. Gen. Bus. Law, §§ 352 *et seq.* (McKinney 1984). The Martin Act governs the offer and sale of securities, commodities, cooperative apartments and condominiums, and regulates the conversion of residential apartment units to cooperative or condominium ownership. The 45-unit building at 444 East 57th Street was converted to condominium ownership under sections 352-e and 352-eeee of the Martin Act between 1981 and 1983. The conversion was accomplished under a non-eviction plan, which provides certain protections for tenants who decide not to purchase their units at the below-market "insider's" price the conversion guarantees them, but instead to continue to rent the apartments as before.

Section 352-eeee(2)(c)(ii) sets forth permissible reasons for which a non-purchasing tenant may be evicted from the apartment, such as non-payment of rent, illegal use of the apartment, or refusal of access to the owner, but otherwise provides that "[n]o eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy." *Id.* Accordingly, tenants protected by the Martin Act may only be evicted for one of the reasons enumerated in section 352-eeee(2)(c)(ii), not because their lease has expired or been extinguished. This provision of the Martin Act therefore grants non-

purchasing tenants of converted cooperative or condominium apartments occupancy rights separate from any lease agreement they may have with the owners of their apartments. Further, this section specifically provides that "an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family." *Id.* It is clear, therefore, that the statutory scheme grants indefinite rights of occupancy to the non-purchasing tenants, and that the purchaser of an occupied apartment is on notice of his potentially long-term inability to occupy the apartment himself. These statutory occupancy rights are separate from and in addition to the occupancy rights guaranteed to rent-regulated tenants under the rent control and rent stabilization statutes, thereby providing non-eviction protection even for apartments whose rents are not controlled by the state.

The RTC argues, without contesting any of the above, that the tenants nevertheless hold their apartments by leases which it can repudiate under FIRREA. The RTC asserts that the tenants hold their apartments pursuant to either 1) the leases which existed prior to application of rent regulation laws, or 2) the leases which remain under a holdover tenancy after preemption of state law. RTC's brief in opposition to State's motion for summary judgment, at 27. Both these arguments put the proverbial cart before the horse, however. The first ignores the fact that the state rent and securities laws do exist, and that whatever lease or other landlord-tenant relationship existed prior to the enactment of those laws is now irrelevant.

The second is simply illogical, since it fails to realize that the state laws will be preempted only if FIRREA grants the RTC power to repudiate statutory tenancies. Whatever leases exist after preemption becomes relevant only after preemption has been decided, not before. Furthermore, even if there is a contractual element to the landlord-tenant relationship under the rent regulations and securities laws, the above discussion demonstrates that the tenants' right of occupancy is still independent of that contractual or lease relationship. Therefore, the RTC's power to repudiate whatever lease or contract exists does not affect the occupancy rights, which are secured by statute.

Accordingly, the State is correct that the East 57th Street tenants, as well as other rent-regulated or non-purchasing cooperative or condominium tenants in New York, enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC.

B. *Does the "any contract or lease" language of FIRREA include statutory tenancies?*

As noted above, section 1821(e)(1) of FIRREA empowers the RTC to repudiate or disaffirm "any contract or lease" that it deems, in its discretion, to be burdensome to the failed institution. Since rent-regulated and non-purchasing cooperative or condominium tenants hold their apartments pursuant to statutory tenancies rather than traditional leases, the issue now presented is whether FIRREA's statutory language, "any contract or lease," is broad enough to include the statutory tenancies.

The RTC initially argues that the court is prevented from interpreting this section of FIRREA by 12 U.S.C. § 1821(j), which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors [of the RTC] by resolution or order, to restrain or affect the exercise of powers or functions of the [RTC] as a conservator or a receiver.

Just what this section of FIRREA means is disputed by the parties. The RTC seeks to interpret it broadly, as a prohibition on the construction or interpretation of FIRREA by federal courts absent an express invitation to do so by the RTC itself. This broad interpretation, however, would be unconstitutional and is therefore untenable. As the court in *Rosa v. Resolution Trust Corp.*, 752 F.Supp. 1231 (D.N.J. 1990), observed, " 'FIRREA did not, and Constitutionally could not, divest an aggrieved plaintiff of the right to seek legal redress when the very subject of the grievance is agency action that is allegedly arbitrary and statutorily impermissible.' " *Id.* at 1236 (quoting *Rechler Partnership v. Resolution Trust Corp.*, No. 90 Civ. 3091 (D.N.J. Sept. 4, 1990), slip op. at 4.9-4.10).[3] While any

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[3] The RTC notes that *Rosa* was overturned by the Third Circuit. While the district court's preliminary injunction was indeed reversed, *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.1991), the appeals court did not reject the district court's reasoning regarding the scope of section 1821(j). Instead, the court stressed that its ruling involved only "application of section 1821(j) to a portion of this injunction, and we express no opinion as to the general scope of the language of that provision." 938 F.2d at 399 n. 21. The rest of the appellate opinion in *Rosa* is consistent with the narrower interpretation of this section discussed below.

judicial interpretation of FIRREA would, in its most general sense, "restrain" the RTC, this broad interpretation of the prohibition in section 1821(j) would "vest RTC with unreviewable power to do as it pleases," and thereby constitute a clear violation of the separation of powers. *Rechler Partnership, supra,* at 4.8.

The State advocates a narrower view of section 1821(j), characterizing it as at most a restraint on federal court interference with the substantive decisions of the RTC, not as a prohibition against judicial interpretation and construction of FIRREA. This is the interpretation adopted by the Third Circuit in *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397-98 (3d Cir.1991). There, the court first considered what the RTC's "powers or functions" were under FIRREA, and then examined whether the disputed court action would "restrain or affect" those statutory powers and thereby violate section 1821(j). Undertaking the same analysis here, it is clear that the court's efforts to interpret FIRREA in this case will not restrain the exercise of the RTC's powers or functions, and therefore will not run afoul of section 1821(j), if those powers or functions do not include the repudiation of statutory tenancies. Therefore, the dispute about the prohibition of section 1821(j) effectively merges with the determination of whether section 1821 (e)(1) expressly preempts the state rent and securities laws, since if the "any contract or lease" language in section 1821(e)(1) does not include statutory tenancies, there will be no preemption and no judicial "interference" as restricted by section 1821(j).

Returning therefore to the construction of "any contract or lease" in section 1821(e)(1), the case of *In re*

Friarton Estates Corp., 65 B.R. 586 (Bankr.S.D.N.Y. 1986) is instructive once again. In that case, the bankruptcy court considered whether a trustee in bankruptcy might, pursuant to section 365 of the Bankruptcy Code, 11 U.S.C. § 365, remove rent-controlled tenants from apartments owned by the bankrupt party. Section 365 empowers the trustee to "assume or reject any executory contract or unexpired lease of the debtor," just as section 1821(e)(1) of FIRREA authorizes the RTC to repudiate or disaffirm "any contract or lease." The *Friarton* court remarked that the trustee's power to remove statutory tenants under the authorization of section 365 was "suspect," since, as noted above, rent-regulated tenants do not hold leases, but rather statutory tenancies. *Friarton, supra*, 65 B.R. at 592.[4] The same reasoning applies here, where the plain language of the statute, "any contract or lease," does not include rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant. *Cf. Patterson v. Federal Deposit Ins. Corp.*,

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[4] The court in *Friarton* set forth two alternative grounds for its holding that the debtor could not avoid the strictures of the state rent control laws through bankruptcy. One is its construction of the "executory contract or unexpired lease " language in section 365, discussed above. The other ground for its holding was that, under 28 U.S.C. § 959(b), trustees in bankruptcy are obligated to obey all "valid laws of the state," thereby requiring compliance with the state rent regulatory laws. The RTC seeks to distinguish *Friarton* by pointing out that there was no preemption of state law in that case because of section 959(b). That argument, while true, does not diminish the fact that the *Friarton* court's construction of the "executory contract or unexpired lease" language is still relevant to the construction issue presented here.

918 F.2d 540, 543 (5th Cir. 1990) (finding that since plaintiff's homestead right was protected by the Texas constitution, it was independent of any agreement between the parties and therefore not included within term "agreement" in 12 U.S.C. § 1823(e)).

Lending further support too the view that "any contract or lease" should not be interpreted broadly to include non-lease statutory rights of occupancy is Congress' list of duties and goals for the RTC. 12 U.S.C. § 1441a (b)(3)(C) instructs the RTC to conduct its operations in a manner which:

> (i) maximizes the net present value return from the sale or other disposition of institutions . . . or assets of such institutions;
>
> (ii) minimizes the impact of such transactions on local real estate and financial markets;
>
> (iii) makes efficient use of funds obtained from the Funding Corporation or from the Treasury;
>
> (iv) minimizes the amount of any loss realized in the resolution of cases;
>
> (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

The court may look to all of these instructions for guidance in interpreting the other provisions of FIRREA that set forth the powers Congress granted the RTC. *See King v. St. Vincent's Hosp.*, ___ U.S. ___, ___, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) ("a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (citations omitted). Three of the

instructions are relevant to the RTC's powers under section 1821(e)(1). Subdivision (i), which instructs the RTC to maximize the net present value return of the assets of failed thrift institutions under its control, clearly weighs in favor of an expansive interpretation of the RTC's repudiation powers under section 1821(e)(1). Such expansive powers would enable the RTC to increase the value of its apartments under rent and securities law restrictions. However, Congress's admonition to the RTC in subdivision (ii) to minimize the impact of the RTC's actions on the real estate market weighs in favor of a narrow construction of section 1821(e)(1). Broadening the powers of the RTC under section 1821(e)(1) by allowing it to repudiate tenants' non-lease rights of occupancy would negatively affect the real estate market in New York, and thus run counter to 12 U.S.C. § 1441a(b)(3)(C)(ii).[5] Further, subdivision (v), which requires the RTC to maximize the preservation of affordable housing, also weighs against expanding the scope of the RTC's powers under section 1821(e)(1), since some of the tenants potentially affected by the RTC's asserted power to repudiate leases in this situation are undoubtedly low- and moderate-income

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[5] The effect of the real estate market in New York can be appreciated by the following figures: As of February, 1991, the RTC was in control of approximately 1,000 rent-regulated condominium or cooperative apartments in New York State. It expected about 1,000 more such apartments to come into its control over the next year. Affidavit of Frederick K. Mehlman, Jan. 8, 1992, Exhibits AA and BB. Interpreting section 1821(e)(1) to include the power to repudiate non-lease statutory occupancy rights would remove all of these apartments from rent and securities laws restrictions, and would certainly have a large impact on the real estate market in New York.

tenants. This is true despite the fact that there is no indication in the present record that the tenants of the nine East 57th Street units are low- or moderate-income individuals, and that New York's rent protections are not linked to income.[6]

Accordingly, two of the three relevant goals behind the RTC's powers counsel a restricted rather than expansive interpretation of the RTC's powers. Therefore, the court declines to expand the reach of section 1821(e)(1) beyond traditional leases and contracts, especially in light of the presumption against preemption that operates in this case. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985).

Having determined that the RTC's repudiation powers under section 1821(e)(1) do not extend to statutory tenancies created under state law, and that rent-regulated or non-purchasing tenants of cooperative or condominium apartments hold statutory tenancies instead of leases, it is clear that the RTC's rights, powers, and privileges do not include the power to evict rent-regulated or non-purchasing tenants of cooperative or condominium apartments. Since the state's rent control, rent stabilization, and real estate securities laws therefore do not subject the RTC to state supervision or direction in

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[6] While the RTC's policy statement on repudiation does exempt low- and moderate-income tenants from eviction, this is irrelevant to the scope of the RTC's *power* under section 1821(e)(1) to repudiate statutory tenancies. Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, the RTC would not be required to adopt the income exemption that it has in fact adopted in this case.

the exercise of its rights, powers and privileges, those laws are not expressly preempted by FIRREA. 12 U.S.C. § 1821(c)(2)(C).

The RTC's arguments on express preemption misunderstand the issues before the court. In all of the cases cited by the RTC, there was clear power in the federal statute to do whatever the government agency sought to do. Here, no such power exists. Accordingly, those cases are inapposite. *See, e.g., Resolution Trust Corp. v. Elman,* 949 F.2d 624 (2d Cir.1991) (RTC's clear power under section 1821(d)(5)(D) to disallow any claim by a creditor or claim of security or priority preempts state retaining lien law); *Federal Deposit Ins. Corp. v. Shain, Schaffer & Rafanello,* 944 F.2d 129 (3d Cir.1991) (same).

III. *Conflict Preemption*

The court must next consider whether FIRREA has preempted the state rent and securities laws because of a conflict between state and federal law. A conflict exists when application of the state laws will create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette,* 479 U.S. 481, 492, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987) (citations omitted); *see also ARC America Corp., supra,* 490 U.S. at 100-101, 109 S.Ct. at 1664-1665; *Silkwood, supra,* 464 U.S. at 248, 104 S.Ct. at 621. Preemption will depend, therefore, on what Congress' objectives were in enacting FIRREA, and on whether the state laws present an obstacle to their accomplishment.

The RTC argues that is congressional mandate under FIRREA to "manage and resolve" failed thrift institutions

effectively preempts all state laws that conflict in any way with its efforts to resolve the failed institutions, and that since the state rent and securities laws involved here conflict with those efforts, they are perforce preempted. These contentions do not withstand analysis, however.

First, the RTC claims that there is a direct conflict in this case between state laws that prevent repudiation of residential "leases" and FIRREA's provision authorizing such repudiation. As the prior discussion demonstrates, however, no such direct conflict exists, since FIRREA does not provide the power the RTC seeks to exercise in this case. FIRREA does not authorize the RTC to repudiate statutory tenancies, and since the tenants in this case enjoy occupancy rights by virtue of those statutory tenancies, the RTC has no power to evict the tenants. Thus, the situation here is not one where a federal statute allows certain agency action while state laws prohibit it, as the RTC claims.

Second, the RTC complains that the state laws effectively thwart its efforts to comply with Congress' mandate to "maximize the net present value return from the sale or other disposition of institutions . . . or the assets of such institutions." 12 U.S.C. § 1441a(b)(3)(C). Therefore, the RTC argues, the state rent and securities laws should be preempted in order to allow the RTC to accomplish its mandate. The congressional mandate in section 1441a(b)(3)(C), however, is an instruction to the RTC on how to exercise the powers granted to it under other sections of FIRREA; it is not a grant of power in itself. The fact that the RTC would be freer to pursue one of its statutory goals if the state law restrictions did not exist does not by itself require preemption, since no conflict

exists between federal statutory power and state statutory restrictions.

Further, since Congress did not give the RTC the power that it seeks to exercise here, i.e. to repudiate statutory tenancies, such repudiation cannot be part of the objectives of Congress that the court must consider under the conflict preemption analysis. While the RTC's inability to evict rent-regulated tenants may indeed hinder its resolution efforts, since hindrance derives not from restrictions state laws place on the powers of the RTC, but rather from the fact that Congress did not give the RTC the power to repudiate statutory tenancies in the first place. Therefore, the RTC's protestations that state rent and securities laws thwart its efforts to dispose of the assets of failed savings and loans are misdirected. The RTC should be complaining to Congress, not to the State of New York, since it is Congress that has impaired the RTC's ability to repudiate statutory tenancies, not New York State. Absent the statutory power it seeks, there is no conflict between federal and state laws in this area, and consequently no basis for preemption of the state rent and securities laws.

The cases cited by the RTC in its conflict preemption brief all deal with direct conflict between specific powers granted in federal statutes and contrary state law restrictions, and are therefore inapposite to the question presented here. *See, e.g., Colorado ex rel. Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 936 (10th Cir.1991) (conflict between 12 U.S.C. § 1836 (k), which allows emergency acquisitions of bank branches notwithstanding any provision of state law, and state laws prohibiting branch acquisition through mergers); *Federal*

Deposit Ins. Corp. v. Bank of Boulder, 911 F.2d 1466 (10th Cir.1990) (conflict between state law prohibition of assignment of letters of credit and 12 U.S.C. § 1823(c)(2)(A), which contains clear authorization for FDIC to purchase assets and liabilities of insured savings and loans); *NCNB Texas Nat'l Bank v. Cowden,* 895 F.2d 1488, 1501 (5th Cir. 1990) (conflict between federal statute allowing FDIC to transfer fiduciary appointments of an insolvent bank to federally established bridge banks and state statutes forbidding such transfers); *Valley Ranch Dev. Co. v. Sunbelt Sav. FSB,* 714 F.Supp. 817 (N.D.Tex.1989) (conflict between Texas fraudulent transfer statute and FSLIC's power under federal statute to transfer assets in its discretion).

While Congress certainly intended FIRREA to give the RTC broad powers,[7] the fact remains that it did not give the RTC the power to repudiate statutory tenancies. The RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than

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[7] In creating the RTC, Congress intended to "enhance certain powers of the FDIC and to eliminate impediments to the efficient resolution of failed financial institutions." *Federal Deposit Ins. Corp. v. Shain Schaffer & Rafanello,* 944 F.2d 129, 131 (3d Cir. 1991); *see also Smallwood v. Office of Thrift Supervision,* 925 F.2d 894 (6th Cir.1991). FIRREA evidences congressional intent to give broad powers to the RTC to resolve the crisis in the savings and loan industry, including powers that the savings and loans did not enjoy prior to being taken over by the RTC. *See, e.g.,* 12 U.S.C. § 1825(b) (no involuntary liens against the property of the receiver); 12 U.S.C. § 1821(d)(12) (mandatory 90-day stay of pending litigation); 12 U.S.C. §§ 1829 and 1822 (no bonds required of the FDIC).

the powers granted by statute; conflict preemption doctrine cannot be used to give the RTC powers that Congress did not see fit to confer on the corporation. Conflicts only exist where there is power under federal statute that is prohibited under state law. Since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here.

IV. *Lloyd Ribners' Rights of Succession*

The RTC also moves for declaratory judgment that it is entitled to evict one of the individual tenants, Lloyd Ribner, Jr., from apartment 14-E at 444 East 57th Street. Ribner seeks to succeed to the occupancy rights of his recently deceased mother. The RTC contends that, even if it is subject to the state rent control and securities laws, Ribner has no right to occupy this apartment. Under the rent control law, a person is entitled to succeed to the right of possession of a rent-controlled apartment where

> [the] family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen" or "disabled person" . . . for a period of no less than one year immediately prior to the permanent vacating of the housing accommodation by the tenant. . . .

N.Y. Comp.Codes R. & Regs., tit. 9, part 2204.6(d)(1) (1990). Ribner alleges that he lived with his mother in the apartment for the requisite period of time. *See* Affidavit of Lloyd Ribner, Jr., Jan. 24, 1992, ¶ 2; Reply Affidavit of Lloyd Ribner, Jr., Jan. 31, 1992, ¶ 1. The RTC presents

evidence that he did not occupy the apartment for the required time period, and that he is therefore not entitled to succeed to his mother's tenancy. Affidavit of David A. Yadgaroff, Jan. 30, 1992, ¶¶ 2-4. Given this dispute as to the facts concerning Ribner's occupancy of the apartment, summary judgment cannot be granted to either side on this issue. Rule 56, F.R.Civ.P.[8]

Nevertheless, Ribner points out that the RTC is required by the rent control laws to give him thirty days' notice before bringing any proceedings to regain possession of the apartment. N.Y. City Admin.Code, 26-403 (e)(2)(i)(10) *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); *Louis v. Barthelme*, 179 A.D.2d 604, 579 N.Y.S.2d 656 (1st Dep't 1992). The record contains no indication that such a notice was ever served upon Ribner. Accordingly, the RTC's complaint must be dismissed as against Ribner.

V. *Conclusion*

In sum, the State's motion for summary judgment is granted and the RTC's motion for summary judgment is denied. FIRREA has not preempted New York's rent control law, its rent stabilization law, or the sections of its

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[8] Ribner's counsel cites New York procedural law throughout his brief in support of summary judgment. Counsel is reminded that in federal court, even where state law provides the substantive rule of decision, the Federal Rules of Civil Procedure, as explicated in the decisions of federal courts, govern procedural matters such as the standard for summary judgment. *See* Rule 56, F.R.Civ.P.; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

general business law dealing with the offer and sale of securities, and the RTC must abide by their provisions. Further, the motion of Lloyd Ribner, Jr., to dismiss the complaint in No. 91 Civ. 1361 as against him is granted.

IT IS SO ORDERED.